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CURRENT TOPICS.

 The index of the last volume of THE CENTRAL LAW JOURNAL has been unavoidably delayed on account of the great amount of matter which it contains. We hope we shall be able to furnish it to our subscribers in a few days.

THE SCHEME AND CHARTER for the city of St. Louis, in the refusal of the Court of Appeals to grant a writ of prohibition, has reached another, and, we hope, a final stage. It will be remembered that during last summer an election took place, under power granted by the Constitutional Convention of Missouri, upon the adoption of a scheme separating the city of St. Louis from the county, for municipal purposes, and of a charter for the government of the new municipality. The proposed charter had been framed by a Board composed of leading freeholders of the city, and contained provisions rendering a higher qualification necessary for public office, making the embezzlement and dissipation of public funds more difficult and detection more sure, abolishing useless offices and consolidating necessary ones, securing greater capacity in public servants, restricting the spending of public moneys, and establishing improvements and safeguards in the administration of public affairs. We regarded, at the time, the proposal as having been carefully planned in the interest of honest, economic and efficient government, and the sentiment of the best class of citizens was decidedly in its favor. It was, however, unexpectedly defeated at the polls. The means which were employed to effect this result were afterwards brought to light upon an application to the Circuit Court for a recount, and an examination of the votes cast was had in pursuance to its order. It was then found that fraud had entered into the election to such an extent as not only to render the apparent result a false one, but to raise the presumption that the subsequent efforts of the opponents of the scheme to defeat it at all hazards were scarcely honest. The commissioners reported that the scheme and charter had been carried by a majority of honest votes, and the parties whose duty it was to certify this result were preparing to execute their functions when application was made to the Court of Appeals for a writ of prohibition. The judgment of that court was delivered on Monday last, denying the writ, and the prospect is that the separation of the city from the county will soon be an accomplished fact. In reviewing the contest which this project aroused, this fact is brought prominently forward, viz.: that whatever may be thought of such returning boards as those of Louisiana and South Carolina, such a board, acting under the di-

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rection of an impartial court of justice, may be an important adjunct to honest government.

WE earnestly invite the attention of the Legislature of Missouri to the condition of the statutes of this state with regard to the duty of railroad companies to fence their tracks, and the liability of such companies for killing or injuring stock which stray upon their tracks where they are not fenced. The statute at present governing this question simply requires railroad companies to erect and maintain good and substantial fences on the sides of the road "*where the same passes through, along or adjoining enclosed or cultivated fields, or unenclosed prairie lands, of the height of at least five feet,*" etc. 1 Wag. Stat., p. 310, § 43. The remaining portion of the statute defines the liability of such corporations for failure to perform this duty; and another statute (1 Wag. Stat. p. 520, § 5) again defines the liability of railroad corporations in such cases. These statutes are good enough, but for the fact that the duty of the railroad company to fence its track is limited to places "*where the same passes through, along or adjoining enclosed or cultivated fields or unenclosed prairie lands.*" This statute must have been enacted in the days of railroad-building, when the country was much more sparsely settled than now, and when it was the policy of the legislature to lay as few burdens upon railroad corporations as possible; but it is seen that it is utterly inadequate as a protection to farmers and stock-raisers against the killing of their stock by passing railway trains. Just why it should have been thought more necessary to fence in unenclosed prairie lands than unenclosed timber lands, can not be seen. Some of the most thickly populated portions of the state, as, for instance, the districts surrounding St. Louis, Jefferson City, Hannibal, Lexington and Boonville, consist chiefly of timber lands; and, unless railroad corporations are required by law to maintain on both sides of their track good and substantial fences through the open country in such districts, there is absolutely no protection to farmers and stock-raisers against the killing and injuring of their stock upon such railroads. The statute resolves itself into a prohibition against people who are so unfortunate as to live where timber grows, from allowing their stock to run at large; while those who are so fortunate as to reside on the prairie are allowed this privilege. Cases have recently arisen where stock has been killed in the vicinity of St. Louis in a district so thickly settled that an accommodation passenger-train stops at fifteen stations in forty-five minutes; and yet, because the country on one side of the track was open timber, it has become a serious question whether the railroad people were liable for the killing of stock which strayed upon the track in consequence of their fence being down. In a state like Missouri, where great stretches of country are, and always will be, uncultivated, the policy of the law evidently is to permit stock to run at large

without hindrance, unless, perhaps, it may be found wise to restrain this right in certain thickly settled districts; a thing which was attempted by the recent stock law which the Supreme Court declared unconstitutional. This being the case, the duty of railway companies should be made imperative to fence their tracks at all places, except where the same are crossed by public highways, or where it is necessary for the accommodation of the public that the track should be left open, as in towns or around depot buildings.

HON. CELSUS PRICE, Superintendent of the Insurance Department of Missouri, has made, through the governor, to the legislature, certain recommendations for the amendment of the insurance laws, some of which, it would seem, deserve to be acted upon. He advises the abolishing of that part of the present law requiring him to make a demand for a special statement of the officers of an insurance company before he can proceed to the examination of such company. The reason that he gives for the proposed change is, that the necessity of making such a preliminary demand is an obstruction to the proper discharge of the duties of his office; and that the examination of a company, like that of a bank, should, to be effectual, be without warning;—a point which is obviously so well taken as to require no argument in its favor.

Another recommendation is, that receivers of insurance companies appointed by the courts should be required to file with the insurance department duplicate copies of all reports which they may make to the courts appointing them. The reason advanced by the superintendent for this recommendation is that, as the law now stands, the department loses all control of the affairs of the insolvent companies after they pass into the hands of receivers. We regret that we can not see equal reasons in support of this recommendation. The ill success which the insurance department has had since its origin in dealing with the affairs of insurance companies, and in exposing and repressing their frauds, peculations and maladministration, convinces us that, when the courts of law get control of such concerns, the public can safely leave them there without any assistance from the insurance commissioner. The St. Louis life insurance companies have, for the last seven or eight years, undergone a steady process of decomposition, accompanied by all the attendant stench, under the very nose of the insurance department. The public have been defrauded in the most shameful manner, and many a victimized policyholder would like to know, if any one can tell, what the office of superintendent of insurance in this state was created for.

Attention is further called to the fact that, during the past year, several insurance companies have been organized in compliance with the insurance laws of other states, and have applied for permission to do business here, which have been found to be unsound and fraudulent in their inception. The superintendent suggests as

a remedy that those portions of the insurance laws permitting the capital of insurance companies, which is paid in on their organization, to be invested in mortgages or deeds of trust on lands, be stricken out, and that companies be required, before going into operation, to have on hand the required capital actually paid in in cash, or invested in stocks or bonds of the United States or the State of Missouri. As Missouri state stocks are just now a first-class security, much beyond the average of real estate mortgages taken by new companies, this recommendation would seem to be a very reasonable and timely one. As it is, the superintendent states, companies can be organized and go into operation without one dollar in cash being paid in, and a wide door is left open for frauds similar to those perpetrated in other states, and, he might have added, similar to those perpetrated in this state. High estimates can be placed upon remote, unproductive and unsalable real estate, and mortgages upon them can be substituted for the cash capital required by law, without deduction. This, as we understand it, is precisely what the superintendent of insurance did when he substituted for securities previously held by the insurance department, a mortgage upon the building of the St. Louis Mutual Life Insurance Company in St. Louis, which investment does not, it is believed, pay much more than the taxes and the office rent of the company. The superintendent desires to be understood as intending to provide simply against the substitution of real estate securities for cash capital required on the organization of these companies. Subsequent investments of earnings may be left to be made by the companies in bonds, mortgages or deeds of trust on real estate.

ONE of the curiosities of literature is a work entitled "The Law of Literature," by James Appleton Morgan (New York: Cockcroft & Co.); and another will be found in his "Notes to Addison on Contracts," published by the same house. As for the "Law of Literature," it has been laughed at so much, that one would think that the author would be glad never to hear of it again. If Mr. Morgan conceives that the few random and scanty notes to De Colyar have made the profession deeply in love with him, we venture to think that he over-estimates the ordinary force of human gratitude in a very extravagant manner. He seems to think, the only duty of an editor is to cite as many cases as possible. He scatters them at the bottom of his pages in the most prodigal fashion. There is neither choice, order, nor discrimination. His favorite way is after this style: "As to infancy see —"; and here will follow the names of a hundred cases, taken apparently from the United States Digest, mere names of cases, and nothing else under heaven. As to whether they fit the text, he never stops to enquire. On page 386, vol. I., the author states the English rule that contracts between solicitors and clients for the purchase of property from the latter, are void; upon which the

editor cites some twenty or thirty cases, without explanation, not one of which supports the rule laid down. And so on all the way through. With a most astounding candor, he says in his preface that he aspires to quote as many cases as possible. He mentions no other object, and we can hardly suppose that he had any other. Whenever he adds anything to his heaps of cases, he betrays that charming ignorance of the simplest rules of English grammar that made his "Law of Literature" such delightful reading. Thus, in vol. I., p. 392, "The English statutes which forbade the purchase of a doubtful title by a stranger, of one not in possession, was re-enacted, &c. &c." Such instances are so frequent that one must conclude that it is well for the editor to stick to the names of cases. Whenever he leaves them, he gets all at once beyond his depth. As for the clearness of his style, the following is a pretty fair average specimen: "But where a ward who had a child by her guardian, and agreed to settle property upon [it], it was held not to be *per se* void." Evidently it must have been the ward that settled the property; but whether it was the property or the child that was held not to be void *per se*, must remain an open question. The reader pays his money, and can take his choice. It would seem that the enterprising publishers having got Mr. Morgan and his office boy to wreck a copy of the United States Digest, might have gone farther, and hired a school-master to correct his English. As to his fidelity to the cases cited, the following summary of *Kearney v. Taylor*, 15 How. 494, must suffice for this time: "A sale at auction to an association, of which the auctioneer is himself a member, is void." Vol. 2, p. 9. We can easily imagine Mr. Morgan standing on one foot in his office whistling Yankee Doodle, and telling his office boy how to make these notes. We think that he has taken, on the whole, unnecessary trouble in the matter. Instead of getting the names of the cases from the body of the digest, he might have cut them from some table of cases at random, with equally good effect. Let no one suppose, however, that we think hardly of Mr. Morgan. In this day of hard work he is setting a worthy example of the way of doing things with no trouble at all. We have even conceived an affection for him; an affection somewhat akin to that which Charles Lamb professed for the five foolish, but gay, good-hearted virgins who had no oil in their lamps. Besides all this, Addison on Contracts is so good a book that "The American Notes" may be skipped, and still there will be enough to satisfy any reader who is not absolutely gluttonous; and it is always a relief to see Smith and Jones waltzing together at the bottom of a page, with a *v.* between them.

LIS PENDENS.

Lord Bacon's rule, that where one "comes in *pendente lite*, and while the suit is in full prosecution, and without any color of allowance or privity of the court, there, regularly the decree bindeth," is perhaps more perspicuously expressed by Chan-

celor Kent, who says that "a *lis pendens* duly prosecuted, and not collusive, is notice to a purchaser so as to affect and bind his interest by the decree."

This rule has been adopted by courts of chancery jurisdiction both in England and the United States. That the doctrine of *lis pendens* rests upon the presumption of notice, has been questioned in *Newman v. Chapman*, 2 Rand. 93, the Chancellor holding, for the reason that, in cases where it operates, it applies where there is no possibility of the purchaser whose interest is affected having notice of the pendency of the suit, that therefore it rests upon reasons of public policy, and not upon any presumption of notice. This reasoning may well be doubted. With equal propriety it might be applied to all the different kinds of constructive notice known to the law, by which persons, ignorant of certain facts, are as uniformly concluded from denying knowledge as though they had actual notice.

The mere fact that it would have been impossible, in the nature of things, for the purchaser to have had actual knowledge of the pendency of the suit, where he is bound by the decree, only tends to illustrate the *conclusiveness* of the presumption of notice. It is conclusive because those to be affected are not permitted to deny it. To allow them to show that actual notice was beyond their reach, would be to destroy the conclusive nature of the presumption. It is true that public policy dictates the rules of presumptive notice; but, after all, however inconsistent it may appear to hold a fact conclusively presumed which is beyond the range of possibility, the presumption which public policy demands remains. The question of its probability or possibility becomes irrelevant, and consequently never comes before the court. If the impossibility of actual notice were inherent in the nature of the proceeding by which the ignorant purchaser is charged, public policy would require no such rule. There would be a stronger reason for abandoning such a rule than for adhering to it. If suits were secretly prosecuted in tribunals whose records and proceedings were carefully concealed from the knowledge of all persons except those directly interested, courts of equity would never attempt to extend their decrees beyond the parties to the suit.

In applying this doctrine, some of the courts in this country have manifested an inclination to restrict its operation to suits affecting the title to real property. *Winston v. Westfeldt*, 22 Ala. 760; *Murray v. Lilburne*, 2 Johns. Ch. 441; *McLaurine v. Monroe*, 30 Mo. 462; *Baldwin v. Love*, 2 J. J. Marsh. 489. But it can hardly be said to be well settled that it may not with equal propriety be applied to sales of chattels. In the case of *Wotlington v. Hawley*, 1 Desau. 167, a purchaser of securities, *pendente lite*, was held to be bound by the decree to the extent that he might be required to restore the securities and receive what he actually paid. It would seem that the same reason for holding the purchaser of real estate bound by

the decree of a court where the title was being litigated at the time of the purchase, would apply where the property transferred was personal instead of real, except in the case of negotiable paper. It is true, that the purchaser is less likely to undertake the investigation of records, to ascertain his grantor's title when he purchases chattels. The title to personal property *prima facie* accompanies the possession. Its ownership is not to such an extent the creature of municipal law as that of real estate. On the other hand, if movables might in all instances be safely transferred *pendente lite*, the purposes of the suit might be more easily defeated or delayed, than where the matter in controversy was the title to real estate. Manual possession of the thing being the object of the suit, the readiness with which the chattel might be transferred renders a decree for its delivery in specie sufficiently difficult of execution; and if actual notice of the pendency of the suit were required in order to charge the purchaser, the transitory nature of the property would render evasion of the law still easier of accomplishment.

The possible harshness of the operation of this rule, though frequently acknowledged by learned judges, has not deterred them from adhering to it as the only safe doctrine. Lord Hardwicke, in *Garth v. Ward*, 2 Atk. 174-5, says: "A decree dismissing a bill of redemption would operate equally in favor of the mortgagee against any person to whom the mortgagors should, during the pendency of that suit, convey, as against himself. * * * So in the case of a mortgagor who comes here for redemption, if, during such suit, he should assign the equity of redemption, and, in the final hearing of the cause, there should be a decree against the mortgagor, will not the assignee of the equity of redemption be bound by this decree?"

The above case is cited in *Bishop of Winchester v. Paine*, 11 Ves. Ch. 194. In the last mentioned case it was decided that where, during the pendency of a suit to foreclose a mortgage, the mortgagor executed a second mortgage upon the same premises, such subsequent mortgagee did not become a necessary party to the suit; and that, where the mortgagor died while the suit was still pending, it was not necessary, on reviving the suit against his representatives, to make parties of mortgagees or purchasers who became such after the original institution of the suit. *Martin v. Stiles*, cited in *Bishop of Winchester v. Paine*, *supra*, is perhaps as strong a case in favor of the doctrine as could well be imagined. There the bill was filed in 1640, and the case abated by death of one of the parties in 1648; the purchase was in 1651, and the bill of review filed in 1662. The decree—1663—held that the apparent *laches* was excused by the wars prevailing at the time, and that the purchaser, while the suit was in abeyance, was bound. This matter was again before the court in *Style v. Martin*, 1 Ch. Ca. 150; but the result reached in the former case was left unchanged.

In the early English cases of *Sorrel v. Carpenter*, 2 P. Williams, 482, *Worsley v. Earl of Scarborough*,

3 Atk. 392, *Walker v. Smallwood*, Amb. 676, *Lowther v. Carlton*, 2 Atk. 242, *Self v. Madox*, 1 Vern. 459, *Finch v. Newhaus*, 2 Id. 216, it is uniformly held that every purchaser, *pendente lite*, even for a valuable consideration and without actual notice, will be bound by the decree, if the suit is one intended to affect the title to the property purchased, whether it be to charge it with debts, to foreclose a mortgage, or is a bill to establish a will and perpetuate testimony, or a proceeding by injunction, or otherwise. *Garth v. Ward*, *supra*.

One of the earliest, if not the first, of the cases in which this doctrine was unequivocally adopted by our American courts, was that of *Murray v. Ballou*, 1 Johns. Ch. 566. In that case, the suit pending at the time of the purchase was against a trustee, charging him with breach of trust, praying that his authority as such might cease, and that he be enjoined from the sale or use of any lands or securities held by him in trust. Chancellor Kent, in deciding that the purchaser *pendente lite* was bound, seems to rest his adhesion to the doctrine of some of the early English cases, cited above, more upon the authority of precedent than upon principle. Still, his defense of the rule upon the ground of necessity indicates that, had the case been one of first instance, he would not have decided it differently.

Since the case of *Murray v. Ballou*, the English doctrine has become quite generally adopted throughout the United States, in courts of equitable jurisdiction, both State and Federal. It has, however, been carefully restricted in its application. *Norton v. Birge*, 35 Conn. 258; *King v. Bell*, 28 Id., 598; *Ray v. Roe*, 2 Blackf. 258; *Green v. White*, 7 Blackf. 242, 11 Ind. 443; *Ferrier v. Buzick et al.*, 6 Ia. 258. It is held not to apply where the court has not jurisdiction of the thing. *Carrington v. Brent's Heirs*, 1 McL. 167; s. c. 9 Pet. 86. Nor until after the service of process, or publication of the orders. *Fowler v. Byrd*, Hemst. 213; *Metcalf et al. v. Smith's Heirs*, 40 Mo. 572; *Samuels v. Shelton*, 48 Mo. 444; *Bailey et al. v. McGinniss et al.*, 57 Mo. 362. Nor where the prosecution has not been constant and continued. *Ferrier v. Buzick et al.*, *supra*; *McGregor v. McGregor*, 21 Ia. 441; *Newman v. Chapman*, *supra*; *Watson v. Wilson*, 2 Dana, 408; *Herrington v. Herrington*, 27 Mo. 560; *Carter v. Mills*, 30 Mo. 432; *Hayden v. Bucklin*, 9 Paige, 513; *Clevenger v. Hill*, 4 Bibb. 499; *Ludlow v. Kidd*, 3 Ham. 541. In the case last cited it was held that the suit was not pending between the time of dismissal and the filing of a bill of review.

In an action to recover a slave from a purchaser *pendente lite*, it was held that, where the plaintiff in the original suit took judgment against the defendant for the value of the slave, on account of his having been sold, he could not recover from the purchaser. Taking judgment as for a conversion of the property was a recognition of the sale and a waiver of his claim for the thing. *Smith v. Brown*, 9 Leigh, 293. The *lis pendens* only af-

fects a purchaser from a party to the suit. *French v. The Loyal Company*, 5 Leigh, 627. Where the holder of a senior mortgage, pending a suit to foreclose a second mortgage upon part of the same land, of which he had no actual notice, released the remaining portion of the land from his mortgage, it was held that he was not affected with notice of the pendency of the suit. *Stuyvesant v. Hone et al.*, 1 Sanf. C. R. 419. And where there is a contingent right to the property, which, during the pendency of the suit, becomes vested by the happening of the event upon which the right depends, as where there is a conditional assignment of a mortgage, and during the pendency of a suit by the assignee to foreclose, the condition of the assignment is broken and the mortgage reverts, the mortgagee is not bound by the decree rendered in favor of the mortgagor. He does not occupy the position of a purchaser *pendente lite*. *Murray v. Blatchford*, 1 Wend. 583.

The purchaser does not become bound as a party to the decree. He cannot be bound by a judgment to which he was not a party. The decree merely follows the property into his hands, and it is bound. *Carter v. Mills*, *supra*. But this only, when the contents of the bill are calculated to affect the title to the property; for the constructive notice is of what the bill contains, and nothing more. *Griffith v. Griffith*, 1 Hoff. C. R. 153; *Stone v. Connelly*, 1 Mete. (Ky.) 654; *Ray v. Roe*, 2 Blackf. 258. During the pendency of the suit, the statute of limitations will not run in favor of the purchaser, so as to defeat the *lis pendens*. *Henly v. Gore*, 4 Dana, 133. Nor will he be protected by the fact that he purchased at a sale under an execution, where the action at law upon which the execution is based was commenced subsequent to the suit in equity. *Scott v. Colman*, 5 Monr. 73. It is not necessary, in order to render the *lis pendens* effectual, that the relief granted should be the same as that prayed for in the bill, provided the suit was originally instituted to affect the property, and has been prosecuted to a decree without intermission. *Turner et al. v. Babb*, 60 Mo. 342; *Stoddard v. Myers*, 10 Ohio St. 365. W.

BANKRUPTCY — COMPOSITION PROCEEDINGS.

IN RE SCOTT, COLLINS & CO.

United States District Court, Eastern District of Missouri, December, 1876.

Before HON. SAMUEL TREAT, District Judge.

1. ONLY ONE MEETING OF CREDITORS REQUIRED.—Under the Bankrupt Act of the United States, no second meeting of creditors to confirm the resolution of the first meeting is necessary, as required by the British act.

2. HEARING—WHAT MAY BE HEARD.—At the hearing, of which the creditors are required to have notice, objections may be presented as to the due passage of the original resolution, the confirmatory signatures, and what is for the best interest of all concerned.

3. WHO MAY BE HEARD.—None but unsecured creditors can be heard at the hearing. *Semble*, that a secured cred-

itor, who does not release his security at or before the first meeting, cannot be heard.

4. PASSAGE OF RESOLUTION—DEBTOR.—Notice to the creditors having been given, the required number of unsecured creditors assembled at the first meeting called may pass the resolution. If a secured creditor wishes to vote he must first relinquish his security. The debtor must appear and submit the statement required. As no other formal meeting of the creditors is required, he is not bound to appear at the hearing, to again submit his statement.

5. HEARING—WHAT COURT MUST DECIDE.—The resolution purporting to have been previously passed, together with the debtor's statement, having been presented to the court, a hearing will be ordered on notice. At this hearing it must be decided whether such resolution was duly passed and the needed confirmatory signatures obtained, and, if proved to the satisfaction of the court, the court must then be satisfied that the terms, etc., are for the best interest of all concerned.

6. SIGNATURES TO RESOLUTION.—It is not necessary that the confirmatory signatures shall be attached to the resolution at the first meeting; but they must be attached before, or at, the hearing. They are essential to make the resolution operative.

7. MEETING TO VARY ORIGINAL PROPOSITION—WHEN MUST BE HELD.—It is the intent of the bankrupt act that a meeting for the purpose of adding to or varying the original proposition should follow the recording, etc., of the former resolution. But, *semble*, that if after the first meeting, and before the hearing, the debtor agrees to enlarge his offer, the court may inquire into it. The proposed advance in the percentage is only demonstrative of the fact that the original proposition, whether confirmed or not by the needed signatures, is not for the best interest of the creditors.

8. CREDITOR'S NAME ON LIST—EVIDENCE.—The fact that a debtor has placed the name of a creditor on his list, does not, *prima facie*, establish that he is a creditor. The creditor must prove himself to be such in the formal manner required by the statute and the general orders. In involuntary proceedings, however, the petitioning creditors, on whose motion an order to show cause has been issued, are not bound to prove anew, and in another and more formal manner, that they are such creditors, at a meeting for composition.

9. THE REGISTER IS AN OFFICER OF THE COURT, and as such, he cannot act independently of its judgments or decrees, but must take notice of them.

10. ATTORNEY APPEARING FOR CREDITOR—DISPUTE—PROCEDURE.—A duly authorized attorney appeared before the register at a composition meeting and offered to vote, as representing a creditor under a power previously given. At the same time another person, claiming to be an attorney, also appeared and produced a telegram which he stated he had just received from the principal revoking the former power, and requesting him to act in his place. *Held*, that it was the duty of the register to have deferred action until he could have examined, to his satisfaction, the proofs of the revocation and new appointment.

11. ATTORNEY—EVIDENCE OF AUTHORITY TO REPRESENT CREDITOR.—When an attorney, duly admitted to practice in this court, appears before the register to represent a person in interest, he must be accepted as such, unless some one puts him to proof by a rule therefor to show his authority. All others must show formal powers of attorney as prescribed by the general orders.

12. EFFECT OF OMISSION OF ASSETS IN STATEMENT.—The fact that some individual assets were omitted in the statement at the first meeting, does not render the action taken thereat void. It is for the court to decide, in the light of the facts, upon the alleged concealment of assets, and upon the failure to name all of the creditors.

13. DILIGENCE REQUIRED OF CREDITORS.—While creditors should have the amplest opportunity to determine their action at each stage of the case, they must be held to the proper measure of diligence. If the provisions of the bankrupt act are to be so administered as to promote dilatory motions, its beneficence will disappear.

TREAT, J.:

This is a proceeding by creditors to have the debtors adjudicated bankrupts. The original petition, with accompanying papers, was filed July 22, 1876. Thereupon, under an order to show cause, the debtors, on August 9, 1876, filed their answer, and demanded a jury.

On September 5th they filed a petition for composition, a meeting to consider which was ordered for September 18th. The history of what ensued is set out in the report of the Register, to understand which, many supplementary facts and proceedings must be considered.

At the first meeting held for composition, certain attaching creditors appeared and claimed the right to participate therein, which claim was denied—and *rightfully*. See Sec. 17, of Act of 1874. These attaching creditors, unless an adjudication were had, would retain their lien as security; and, therefore, within the terms of the act might, or might not, be secured creditors, dependent on the fact whether an adjudication of bankruptcy should be had. The act contemplates that secured creditors shall not have a vote at said composition meeting unless they first relinquish their security. True, the act, in terms, refers to creditors fully secured; but that must be held to have reference solely to the value of the security compared with the amount of the debt. Hence, if the attaching creditors desired to participate in said meeting, they should have released their attachments. It seems they preferred, inasmuch as no adjudication was had, to hold their attachments; so that, if the composition were effected, they could obtain their demands in full; yet it was obvious that the debtors, who had interposed a denial of bankruptcy, could, at any moment, by consenting to the adjudication, cause the attachments and the supposed security based thereon to disappear. Thus the attaching creditors were, in a certain sense, subject to the will of the debtors. The latter denied bankruptcy, and if no adjudication followed, the attaching creditors were secured, and consequently could not be heard at the composition meeting. If the composition were effected, in that condition of affairs, without adjudication, the attaching creditors would not be disturbed in their secured demands. Still, the debtors had it in their power to cause that security, by attachment, to disappear at any instant, by consenting to adjudication. The way out of that difficulty was for the creditors to release their attachments, or for the debtors to permit adjudication to be made. No such action having been had, the first composition meeting was held and the resolution duly passed; the votes of the attaching creditors having been rightfully excluded.

The second meeting, or hearing, was then ordered, at which the attaching creditors again appeared and insisted upon entering into a protracted examination, not of the bankrupts alone, but of an indefinite number of witnesses. Application having been made to the court to determine what was the lawful course to be pursued under the then state of facts, it was held, substantially, that the attaching creditors could not, nor could the debtors, play "fast and loose;" that if the attaching creditors wished to intervene, they must assume the position of *unsecured* creditors; and, on the other hand, if the debtors wished to contest the allegations of bankruptcy, in good faith, whereby the attaching creditors were secured if no adjudication followed, they ought, in some way, so to appear of record. It was obvious that the respective parties were standing at bay—each holding the other at arm's length—to the great injury of all others in interest, and involving an indefinite delay in the proceedings, with accumulating costs. Hence, on application to the court, it was ruled that the proceedings for the hearing should not be delayed or interrupted by the attaching creditors, unless they first released their supposed securities; nor should they or other creditors protract the investigation unnecessarily. That ruling may have been improvident from a failure to scrutinize with due accuracy the precise condition of the case as then pending. It was supposed by the court that the order

of reference to the Register required him to report, not only whether the resolution for composition had been duly passed at the first meeting, but, also, whether it had been confirmed by the required signatures, and whether the terms of the composition were for the best interest of all concerned. It seems that the order did not include either of the latter questions, as it should have done. Hence, much of the confusion and difficulty, entailing upon the Register and others a large measure of embarrassment.

Before proceeding to consider in detail any of the many exceptions to the Register's report, it is necessary to interpret carefully the provisions of the statute under which these proceedings for composition have been had.

The United States act, as to composition (1874), is, to a large extent, borrowed from the English act of 1868. The changes made must be carefully noted, in order to ascertain what Congress designed should be the proper course of proceedings in this country. It is well known, and was so pronounced by Justice Miller on this circuit, that the act of 1874 was designed to mitigate, in favor of the debtor, the rigors of the act of 1867. One of the most important amendments, by the act of 1874, related to involuntary bankruptcy, whereby it was no longer left in the power of *one* creditor, regardless of the wishes of all others, to force a debtor into bankruptcy. The amendatory act of 1874 required one-fourth in number of the creditors, whose demands were equal, in the aggregate, to one-third of the provable debts, to join, in order to commence involuntary proceedings. The act of 1874 permits a discharge of a voluntary bankrupt whose assets equal thirty per cent. of his debts proved, or who procures the assent of at least one-fourth of his creditors in number and one-third in value. That act, therefore, had a plain and evident intent, viz.: to put proceedings in voluntary and involuntary bankruptcy on exactly the same footing so far as the action of creditors was needed; for precisely the same requirements for a discharge in voluntary cases are exacted as for involuntary proceedings—discharges, under the latter, following, as a matter of course, so far as dependent on the assent of creditors. Thus, if the required number to force a debtor into bankruptcy choose so to do, they thus act with full knowledge that the debtor's discharge will follow, irrespective of the percentage realized from his estate. The law was thus made simple and uniform. In voluntary cases the required number assent to the discharge at the *close* of proceedings, and in involuntary, the same number, by *instituting* the proceedings, assent in advance.

So, when the provisions as to composition are considered, we find the same design to favor the unfortunate debtor. Previously, compositions had, (to be effective), to have the assent, as a general rule, of *all* the creditors—a rule which put it in the power of *one* creditor, as in the cases of involuntary bankruptcy, to thwart the wishes and interests of all other creditors and of the debtor. As to composition, however, a larger number is required than to effect involuntary bankruptcy, to-wit: a majority in number, and three-fourths in value of the creditors *assembled*, to be confirmed by the signatures of two-thirds in number and one half in value of *all* the creditors. This provision as to composition proceedings, furnished a large measure of relief to the debtor and assenting creditors.

It is in view of the purpose of this congressional legislation, that the act of 1874 should be interpreted, viz., that it is no longer left in the power of one creditor to force a debtor into bankruptcy, or to defeat a composition, against the wishes of all other creditors and of debtors. With these considerations in mind, it is necessary to look to the provisions of the British

Statute of 1868, and of the United States Statute of 1874, to ascertain what Congress designed should, as to composition proceedings, be the mode of action, and the rules to be observed.

A reproduction of the respective statutes, in *hac verba*, in parallel columns, will show wherein Congress changed the borrowed British Statute; and in the light of the liberal purpose above suggested, what Congress intended should be the rule in this country. It must be noted that the British act contemplates composition proceedings without first commencing an action in bankruptcy, while the United States act contemplates that composition proceedings shall follow a bankruptcy suit commenced.

UNITED STATES.

"That in all cases in Bankruptcy now pending, or to be hereafter pending, by or against any person, whether an adjudication in bankruptcy shall have been had or not, the creditors of such alleged bankrupt may, at a meeting called under the direction of the court, and upon not less than ten days' notice to each known creditor of the time, place, and purpose of such meeting, such notice to be personal or otherwise, as the court may direct, resolve that a composition, proposed by the debtor, shall be accepted in satisfaction of the debts due to them from the debtor."

"And such resolution shall, to be operative, have been passed by a majority in number and three-fourths in value of the creditors of the debtor, assembled at such meeting either in person OR BY PROXY, and shall be confirmed by the signature thereto, of the debtor and two-thirds in number and one-half in value of all the creditors of the debtor."

"And in calculating a majority for the purposes of a composition under this section, creditors whose debts amount to sums not exceeding fifty dollars, shall be reckoned in the majority in value, but not in the majority in number; and the value of the debts of secured creditors above the amount of such security to be determined by the court, shall, as nearly as circumstances admit, be estimated in the same way."

"And creditors whose debts are fully secured shall not be entitled to vote upon or to sign such resolution without first relinquishing such security for the benefit of the estate."

"The debtor, unless prevented by sickness, or other cause satisfactory to such meeting, shall be present at the same, and shall answer any inquiries made of him; and he, or, if he is so prevented from being at such

BRITISH.

"The creditors of a debtor unable to pay his debts may, by an extraordinary resolution, resolve that a composition shall be accepted in satisfaction of the debts due to them from the debtor."

"An extraordinary resolution of creditors shall be a resolution which has been passed by a majority in number and three-fourths in value of the creditors of the debtor, assembled at a general meeting to be held in the manner prescribed, of which notice has been given in the prescribed manner, and has been confirmed by a majority in number and value of the creditors assembled at a subsequent general meeting, of which notice has been given in the prescribed manner, and held at an interval of not less than SEVEN days nor more than FOURTEEN days from the date of the meeting at which such resolution was first passed."

"In calculating a majority for the purposes of a composition under this section, creditors whose debts amount to sums not exceeding ten pounds, shall be reckoned in the majority in value, but not in the majority in number, and the value of the debts of secured creditors shall, as nearly as circumstances admit, be estimated in the same way, and the same description of creditors shall be entitled to vote at such general MEETINGS as in bankruptcy."

(No similar provision.)

"The debtor, unless prevented by sickness or other cause satisfactory to such meetings, shall be present at both the meetings at which the extraordinary resolution is passed, and shall answer any inquiries made

meeting, some one in his behalf, shall produce to the meeting a statement showing the whole of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due."

"Such resolution, together with the statement of the debtor as to his assets and debts, shall be presented to the court; and the court shall, upon notice to all the creditors of the debtor of not less than five days, and upon hearing, inquire whether such resolution has been passed in the manner directed by this section; and if satisfied that it has been so passed, it shall, subject to the provisions hereinafter contained, and upon being satisfied that the same is for the best interest of all concerned, cause such resolution to be recorded and statement of assets and debts to be filed; and until such record and filing shall have taken place, such resolution shall be of no validity. And any creditor of the debtor may inspect such record and statement at all reasonable times."

"The creditors may, by resolution passed in the manner and under the circumstances aforesaid, add to, or vary the provisions of, any composition previously accepted by them, without prejudice to any persons taking interests under such provisions who do not assent to such addition or variation. And any such additional resolution shall be presented to the court in the same manner, and proceed with in the same way and with the same consequences, as the resolution by which the composition was accepted in the first instance."

"The provisions of a composition accepted by such resolution in pursuance of this section shall be binding on all the creditors whose names and addresses, and the amounts of the debts due to whom, are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditors."

"Where a debt arises on a bill of exchange or promissory note, if the debtor shall be ignorant of the holder of any such bill of exchange or promissory note, he shall be required to state the amount of such bill or note, the date on which it falls due, the names of the acceptor and of the person to whom it is payable, and any other particulars within his knowledge respecting the same; and the insertion of such particulars shall be deemed a sufficient description by the debtor in respect to such debt."

Any mistake made inadvertently by a debtor in the statement of his debts may be corrected upon reasona-

ble of him, and he, or if he is so prevented from being at such MEETINGS, some one on his behalf, shall produce to the meeting a statement showing the whole of his assets and debts and the names and addresses of the creditors to whom such debts respectively are due."

"The extraordinary resolution, together with the statement of the debtor as to his assets and debts, shall be presented to the registrar, and it shall be his duty to inquire whether such resolution has been passed in the manner directed by this section, and if satisfied that it has been so passed, he shall forthwith register the resolution and statement of assets and debts; but until such registration has taken place, such resolution shall be of no validity; and any creditor of the debtor may inspect such statement at prescribed times, and on payment of such fee, if any, as may be prescribed."

"The creditors may, by an extraordinary resolution, add to or vary the provisions of any composition previously accepted by them, without prejudice to any persons taking interests under such provisions who do not assent to such addition or variation; and any extraordinary resolution shall be presented to the registrar in the same manner and with the same consequences as the extraordinary resolution by which the composition was accepted in the first instance."

"The provisions of a composition accepted by such extraordinary resolution in pursuance of this section, shall be binding on all the creditors whose names and addresses, and the amount of the debts due to whom, are shown in the statement of the debtor produced to the MEETINGS at which the resolution has passed, but shall not affect or prejudice the rights of any other creditors."

"Where a debt arises on a bill of exchange or promissory note, if the debtor is ignorant of the holder of any such bill of exchange or promissory note, he shall be required to state the amount of such bill or note, the date on which it falls due, the name of the acceptor or person to whom it is payable, and any other particulars within his knowledge respecting the same; and the insertion of such particulars shall be deemed a sufficient description of the creditor of the debtor in respect of such debt, and any mistake made inadvertently by a debtor in the statement of his debts may be corrected after the prescribed notice

ble notice, and with the consent of a general meeting of his creditors."

"Every such composition shall, subject to priorities declared in said act, provide for a *pro rata* payment or satisfaction, in money, to the creditors of such debtor, in proportion to the amount of their unsecured debts, or their debts in respect to which any such security shall have been duly surrendered and given up."

"The provisions of any composition made in pursuance of this section may be enforced by the court, on motion made in a summary manner, by any person interested, and on reasonable notice; and any disobedience of the order of the court made on such motion shall be deemed to be a contempt of court."

"Rules and regulations of court may be made in relation to proceedings of composition herein provided for in the same manner, and to the same extent as now provided by law in relation to proceedings in bankruptcy."

"If it shall at any time appear to the court, on notice, satisfactory evidence, and hearing, that a composition under this section can not, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the court may refuse to accept and confirm such composition, or may set the same aside; and in either case, the debtor shall be proceeded with as a bankrupt, in conformity with the provisions of law, and proceedings may be had accordingly; and the time during which such composition shall have been in force shall not, in such case, be computed in calculating periods of time prescribed by said act."

A correct analysis of these statutes will show, as to the questions now before the court, the evident intent of the United States statute in changing the provisions of the borrowed British act. By the latter (British) act, two meetings of creditors are required, at each of which the debtor must appear, &c., and submit a statement of his assets, debts, &c. The United States statute, seemingly, provides that, instead of the debtor's appearance at a second meeting, with the production of his statement anew, a confirmation of the original resolution by the signatures thereto of the debtor and two-thirds in number and one-half in value of *all* his creditors, shall be sufficient. At the *first* meeting the debtor must appear, make his statement, &c., the resolution to be passed by a majority in number and three-fourths in value of the creditors *assembled*, due notice to each creditor having been given as required by the act, which resolution must be confirmed (when?) by the signatures of two-thirds in number and one-half in value of *all* the creditors. The British act requiring two meetings, makes it necessary that at the first meeting a majority in number and three-fourths in value of those assembled shall assent, and so does the United States statute. The British statute calls for a second

has been given, with the consent of a general meeting of his creditors."

(No similar provision.)

"The provisions of any composition made in pursuance of this section may be enforced by the court on a motion made in a summary manner by any person interested, and any disobedience of the order of the court made on such motion shall be deemed to be a contempt of court."

"Rules of court may be made in relation to proceedings on the occasion of the acceptance of a composition by an extraordinary resolution of creditors, in the same manner, and to the same extent and of the same authority, as in respect of proceedings in bankruptcy."

"If it appear to the court, on satisfactory evidence, that a composition under this section can not, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the court may adjudge the debtor a bankrupt, and proceedings may be had accordingly."

general meeting of creditors, after due notice, at which second general meeting the confirmation must be voted for by a *majority in number and value* of the creditors *assembled*. The distinction is apparent. Under the United States statutes, as also under the British, the vote of a majority in number and three-fourths in value of creditors *assembled*, is necessary to pass the composition resolution at the first meeting.

At the second meeting for which the British statute provides (to be held on full notice, &c.), a *majority in number and value* of creditors *assembled* decide for confirmation. Not so under the United States statute; for it requires *two-thirds* in number and one-half in value of *all* the creditors of the debtor to confirm the composition resolution by their signatures. Why this change? Was it not the design of the United States statute to obviate the necessity and expense of the second meeting of creditors as required by the British statute, and to substitute therefor the signatures of the creditors, requiring, however, *two-thirds* of *all* the creditors, instead of those assembled? The important differences are that, under the British statute, a *second* meeting of creditors is required, at which a *majority* in number and value of those *assembled* can confirm; while under the United States statute, there is no second meeting of creditors to formally pass upon the confirmation. The United States statute says the resolution passed at the first meeting shall be confirmed, not by a majority in number and value of those assembled at the second meeting, but by the signatures of *two-thirds* in number and *one-half* in value of *all* the creditors. Hence, under the British statutes, the creditors have *two* meetings, at each of which the debtor must appear with his statements; and the creditors must decide at the first meeting, by a majority in number and *three-fourths* in value, and at the second meeting by a majority in number and *value* of the creditors *assembled*. But by the United States statute, the same number is required for the first meeting; but instead of a second meeting, where, as under the British statute, a majority in number and value of those assembled would prevail, a confirmation by signatures is required of *two-thirds* in number and one-half in value of *all* the creditors of the debtor.

This absence of a second meeting, with its attendant costs and possible delay, is compensated under the United States statute by the fact that the signatures of two-thirds of *all* the creditors, instead of a mere majority of those assembled, together with a half in value, are requisite. Still, the United States statute provides that, after the first meeting, notice shall be given to *all* the creditors, and a hearing be had whether the composition resolution was duly passed, and that the court, if satisfied that it was so passed, and that the same is for the best interest of all concerned, cause the same to be recorded, whereby the composition becomes effective. Was this notice to the creditors for the said hearing to take the place of the second meeting under the British statute, or was the confirmation by signatures to have that effect? If the latter, why notify creditors of this hearing? The court can ordinarily determine by the record whether the resolution was duly passed, if the creditors have not, as under the British statute, a second vote upon the proposition. Why, then, the notice to the creditors of this hearing? Obviously, that they may be present and submit any objection they may have as to the validity of the first meeting and what was done thereat, and also show what they deem the best interest of all concerned may require. Unless this is the purpose of the notice, no reason therefor appears.

It is, therefore, ruled as to many of the exceptions filed, based on the theory that, as under the British statute, a second meeting of creditors is necessary to be

held to confirm the original resolution, that no such second meeting *as such* is necessary. It is also ruled that at the hearing, of which creditors are to have the required notice, objections can be presented as to the due passage of the original resolution as to the confirmatory signatures, and as to what is for the best interest of all concerned. In this view the court has heretofore given several orders in this case, some of which, for lack of precision, have caused embarrassment.

At the hearing, for which due notice was given, none but unsecured creditors should have been heard. It may be a question whether a secured creditor, who does not release his security, at or before the *first* meeting, can have any status at the subsequent hearing by then releasing for the purposes of opposition. In this case, he was permitted to do so, and although no exceptions thereto are filed, yet the court does not wish it to be considered that such a right exists. Parties ought to elect at a proper time what to do, where the right of election exists, and not speculate upon the chances of litigation. The court, however, did permit the parties having attachment, on releasing the same, to appear and contest at the hearing. From the insufficiency of the order entered, requiring an investigation as to the signatures confirmatory of the resolution, and also as to what the best interest of all concerned demands, much of the doubt and difficulty in this case has arisen.

At the hearing, on notice to the creditors, many have appeared, and object: 1st. As to several matters connected with the adoption of the resolution, and confirmatory signatures. 2d. As to what may be for the best interest of all concerned. Under this objection, it must not be supposed, that they are at liberty to defeat the proposed composition against the wishes of the creditors generally, because, if defeated, some peculiar benefit may accrue to the objectors, who are in a minority. The design of the statute is to give the required number the control of the proposition, which, if passed as the law exacts, ought to be recorded and become operative, unless such facts are brought to the knowledge of the court, as demonstrate that the resolution passed and confirmed is not for the best interest of all concerned. It will be seen that, by the British statute, the registrar records the resolution after the *second* meeting, if the proceedings to that stage have conformed to the law. It is twice stated in the United States statute, on the other hand, when the court may interpose to prevent or set aside the composition. Again, this marked difference is observable, viz: Under the British statute the required votes are those of the creditors *assembled* at both meetings; but under the United States statute, it is the required votes of those *assembled* at the first meeting, and confirmed by the required signatures of *all* the creditors.

This distinction between the two acts indicates that under the U. S. statute, only *one* meeting of creditors, as such, is to be held, and that, instead of the second meeting required by the British statute, the confirmatory signatures shall be sufficient. Some of the English cases cited evidently rest on this difference. Where a majority assembled are to decide, it is imperative that all should have had notice of the meeting; but where the composition cannot be effective without the confirmation of all creditors, whether present at a meeting or not, a safeguard exists independent of formal notice. *Ex parte Sidney*, 24 L. T., (N. S.) 401; *Ex parte Rogers*, 22 L. T. (N. S.) 283.

Without entering more at large into the differences between the two statutes, and the reasons therefor, it must suffice to state, succinctly, the rulings of this court on the various propositions submitted.

First. Notice to the creditors having been given, the required number of unsecured creditors, *assembled* at the first meeting called, could pass the resolution. If

a fully secured creditor wishes then to vote or interfere, he must first relinquish his security. At that meeting the debtor must appear in person, or by a representative, and submit the statement required. As no other formal meeting of the creditors is required, he is not bound to appear at the hearing, to submit anew the statement previously made by him, or any other statements.

Second. The resolution purporting to have been previously passed, together with the debtor's statement as required, having been presented to the court, a hearing is to be ordered on notice to the creditors; at which hearing it must be decided whether such resolution was duly passed, &c. If it be held that the resolution was duly passed, and the needed confirmatory signatures had, the next step is to satisfy the court that the terms offered, &c., are for the best interest of all concerned. At this point, it should be noted, that more than the formal passage of the resolution, at the previous meeting, is necessary, to make the same operative, viz: the required confirmatory signatures.

But when are those signatures to be had? The resolution is to be first passed by a majority in number and three-fourths in value of the creditors *assembled*, and confirmed by the signatures of the debtor and two-thirds in number and one-half in value of *all* the creditors, whether present or absent. It is obvious that the statute does not contemplate that the confirmatory signatures shall necessarily be attached to the resolution at no other time than at the first meeting; for, if a majority in number and three-fourths in value of those *assembled* vote for the resolution, it has passed. To that resolution, as *thus* passed, confirmatory signatures of a very different number of creditors are necessary, who are not necessarily present and voting at that meeting.

Third. After due notice for the *hearing*, the court must ascertain, therefore, not only whether the resolution was formally passed, but also whether the confirmatory signatures required have been secured. Those signatures may, or may not, be attached to the resolution at the prior meeting; but they must have been attached before the hearing, or be attached at the hearing. The confirmatory signatures are essential to make the resolution operative.

Fourth. A meeting for the purpose of adding to or varying the original proposition, the statute contemplates, is one to *follow* the recording, &c., of the former resolution. Such are the requirements of the British statute, and such is the evident intent of the United States statute. Each statute proceeds, as to that provision, upon the theory that a composition has previously been duly confirmed and recorded. From some cause, subsequently occurring or discovered, the creditors may compel a new meeting to be held, following, however, all the modes of proceeding exacted with regard to the original resolution and proposition. While this is true, this court is not prepared to say that, if after the first meeting the debtors agree to enlarge their offer, the creditors ought to be precluded from having the benefit thereof without being driven to the necessity of a new meeting and hearing, with confirmatory signatures, &c.; thereby adding costs and expenses, to the injury of creditors, it may be, and of the debtors. Still, the technical difficulty, urged by counsel, remains, viz.: that as the hearing is only for the purposes mentioned concerning the original proposition, how can the court consider entirely new and independent propositions at the instance of the debtor or of any creditor? On the other hand, if the required number passed the original resolution and the required signatures confirmatory had been attached, so that no objection thereto could be sustained, and the court had advanced to the second stage of inquiry, viz.: whether

the terms agreed upon were for the best interests of all concerned, should it refuse to give to the creditors the proffered benefit of the increased sum? Under the British statute the third meeting, to add to or vary, occurs when from subsequent events the debtor becomes unable to comply with the original terms. No instance is known where such a meeting was needed or held to enable the creditors, already bound to a smaller sum, to agree to receive more than the law had awarded, with their consent, in the absence of fraud.

If, however, the needed inquiries at the hearing disclose that there were concealed assets, or that the original terms were not for the best interest of all concerned, should the debtor, by advancing the terms, drive the court into a new inquiry, viz.: whether some new proposition, instead of the first, would not satisfy the court as to what the interest of all concerned might require under the changed phase of the case? If this is permissible, would not these proceedings be extended indefinitely, compelling the court, when the debtor thus confesses that he could and ought to do better than he proposed, to enter upon a new inquiry with not only suspicion aroused, but with a confessed fact before it, that the debtor had not acted fairly towards his creditors? It is held, therefore, that the proposed advance in the percentage is only demonstrative of the fact that the original proposition, whether confirmed or not by the needed signatures, is not for the best interest of the creditors.

It may be important, however, as doubts exist with respect to former rulings of this court in some particulars, and as the questions arise on the face of the register's report, with exceptions thereto, that decisions thereon should be made. As to these subsidiary propositions, the court holds:

First. That when proceedings are commenced, voluntarily or involuntarily, and a list of creditors is presented, it is not to be taken for granted that each creditor thus named is really what the debtor in his schedule chooses to state. None but *bona fide* creditors are to have a voice in the composition proceedings, and the simple fact that the debtor chooses to place them on his list, does not, even *prima facie*, establish that they are creditors. On the other hand, when involuntary proceedings are instituted, and the court has held that the moving creditors are such for initiating the proceedings, they are to be considered such at composition meetings without further proof. If any one desires to go behind that action of the court, he must do so by instituting proper proceedings therefor. It must suffice for the register that such creditors have had their demands passed upon by the court, and he must take notice thereof. The register is an officer of this court, and as such he cannot act independently of its judgments or decrees, but must take notice of them. Were this not so, there would be an independent court held by the register, to whom the United States District Court must certify its action, under all the solemnities of certificates, to the great expense, delay and annoyance of those whose demands have already been passed upon by the judge. This would involve the folly of having a register review the action of the judge, when the register's action the judge has to pass upon finally.

It has been urged that, as the debtor is, in either a voluntary or an involuntary case, to furnish a list of his creditors, those named by him have a right to appear at the composition meeting without proof, and to be recognized as such creditors for the sum named. Such is not the law. If a debtor can furnish an unscrutinized list, which must be received as correct without proof, then it would be within the power of any debtor to defeat the main purposes of the bankrupt act. Every one who claims to be a creditor must establish his

claim. If his claim as such creditor has already been established by the court, so as to permit him to move in involuntary proceedings, he is decided to be a creditor. The rule, therefore, is this: that in involuntary proceedings, the petitioning creditors, on whose motion an order to show cause has been issued, are not bound to prove anew, and in another and more formal manner, that they are such creditors, at a meeting for composition. All other creditors must prove themselves to be such in the formal manner required by the statute and general orders in bankruptcy.

Second. It has heretofore been ruled that, when an attorney, duly admitted to practice in this court, appears before the register to represent a person in interest, he is to be accepted as such attorney, unless some one puts him to proof, by a rule therefor, to show his authority. All others must show formal powers of attorney as prescribed by law, and general orders in bankruptcy.

Third. A more difficult proposition arises, as presented in this case, when a duly authorized attorney appears before the register and offers to vote under a power previously given, but at the same time another person, claiming to be an attorney, also appears, and produces a telegram just received from the principal, revoking the former power, and requesting the last named to act. In such cases it may be well for the register, in his discretion, to defer action until it is ascertained, without unnecessary delay, whether the revocation and new appointment have actually been made. It is obvious that such dilatory matters, through erroneous statements, may be started at the last moment to the serious injury of others. While such telegrams should be treated with extreme caution, and not received as authoritative, yet, it would not be objectionable for the register to suspend action, if in his discretion the facts justified, until within due time he could have presented to him the proofs of revocation and of a new appointment. Such cases can not be subjected to any fixed rules; for they are suspicious in all instances growing out of supposed laches.

Fourth. It is objected that some *individual* assets were omitted in the statement at the first meeting, and consequently all done thereat was void. The act provides for the correction of any inadvertent mistake as to debts; but nothing is, in terms, stated concerning errors as to assets. Under the British statute, where two successive meetings have to be held, at each of which a statement by the debtor has to be made, it has been held (*Quære?*) that a failure to make a full and accurate statement, or a failure to disclose all the creditors, would render the meetings void. But the United States statute subjects all of these proceedings to the investigation of the court. It is for the court to decide, in the light of the facts, upon the alleged concealment of assets, and upon the failure to name all of the creditors. This is the more obvious from the fact that the composition, if recorded, does not bind any creditor whose name does not appear in the debtor's statement.

There are many specific objections made as to receiving or rejecting votes at the last meeting or hearing, which, if the parties desire, will be passed upon *seriatim*. All of those objections are supposed to be covered by the rules now stated. While creditors, duly shown to be such, should have the amplest opportunity, consistent with legal rules, to determine their line of action at each stage of the case, they must be held to the proper measure of diligence. Whether acting in person, or by proxy, they should reach a conclusion at the proper time, and not delay or embarrass proceedings by shifting their course after action had, or by changing proxies while final action is about to occur at the hearing ordered. Neither the Register nor the Judge should, at such a time, be asked to delay

the hearing, to the annoyance of all present, in order to embark upon a new inquiry as to the changing views of the respective creditors concerning their proxies, &c. It is the duty of all to be at the hearing, prepared to act. If the provisions of the Bankrupt Act are to be so administered as to promote dilatory motions, its beneficence will disappear. Both debtor and creditor may be otherwise devoured at the will or caprice of one or more creditors, or at the shifting caprices of a debtor. It is the duty of those intrusted with the administration of the Bankrupt Act to protect the interests of all concerned, and not suffer needless expense and delays. The very object of a composition may be defeated, if one or more factious creditors can defeat the wishes of others; yet a reasonable time should be given for investigation, and for the correction of formal errors.

LIABILITY OF EXPRESS COMPANY FOR LOSS IN RAILWAY ACCIDENT.

BANK OF KENTUCKY vs. ADAMS EXPRESS CO.,
PLANTERS' NATIONAL BANK vs. SAME.

Supreme Court of the United States, October Term, 1876.

1. EXPRESS COMPANY—CONTRACT RESTRICTING LIABILITY.—An express company, by a contract made with those who intrust property to it for carriage and delivery at the time it receives the property, does not exempt itself from liability for consequences of the negligence of a railroad company or its agents, not owned or controlled by it, but which it employs in the transportation of the property by a stipulation that it shall not be liable for loss by fire.

2. STIPULATION CAN NOT COVER NEGLIGENCE.—RAILROAD AGENT OF EXPRESS COMPANY.—In the bill of lading given by defendant, it was stipulated that "the express company are not to be liable in any manner, or to any extent, for any loss or damage, or detention of such package or its contents, or of any portion thereof, occasioned by fire." Held, that this exception could not extend to losses by fire occasioned by the negligence of defendant or its servants, nor to losses by fire occasioned by the negligence of a railroad company employed by it in the transportation of the property. The railroad company, in such case, is the agent of the express company, and the latter is liable for the acts of the former as such agent.

IN ERROR to the Circuit Court of the United States for the District of Kentucky.

Mr. Justice STRONG delivered the opinion of the Court.

The defendants in each of these cases are an express company engaged in the business of carrying for hire, money, goods, and parcels, from one locality to another. In the transaction of their business, they employ the railroads, steamboats, and other public conveyances of the country. These conveyances are not owned by them, nor are they subject to their control any more than they are to the control of other transporters or passengers. The packages intrusted to their care are, at all times, while on these public conveyances, in the charge of one of their own messengers or agents. In conducting their business, they are associated with another express company, called the Southern, and the two companies are engaged in carrying by rail through Louisiana and Mississippi, to Humboldt, Tennessee, and thence over the Louisville and Nashville railroad to Louisville, Kentucky, under a contract by which they divide the compensation for carriage in proportion to the distance the package is transported by them respectively. Between Humboldt and Louisville, both companies employ the same messenger, who is exclusively subject to the orders of the Southern Express Company when south of the northern boundary of

Tennessee, and to the orders of the defendants when north of that boundary.

Such being the business and occupation of the defendants, they are to be regarded as common carriers, and in the absence of stipulations to the contrary, subject to all the legal responsibilities of such carriers.

On the 26th day of July, 1869, the Southern Express Company received from the Louisiana National Bank at New Orleans two packages, one containing \$13,528.15, for delivery to the Bank of Kentucky, Louisville, and the other containing \$3,000, for delivery to the Planters' National Bank of Louisville, at Louisville. The money belonged to the banks respectively to which the packages were sent. When the packages were thus received, the agent of the Southern Express Company gave a receipt or domestic bill of lading for each, of which the following is a copy (the two differing only in the description of the consignees and in the amount of money mentioned):

"Domestic bill of lading.

"SOUTHERN EXPRESS COMPANY, EXPRESS FORWARDERS.

"No. 2. \$13,528.15. "JULY 26, 1869.

"Received from Lou. Nat. Bank one package, sealed, and said to contain thirteen thousand five hundred and twenty-eight 15-100 dolls.

"Addressed Bank of Kentucky, Louisville, Ky. Freight coll.

"Upon the special acceptance and agreement that this company is to forward the same to its agent nearest or most convenient to destination only, and then to deliver the same to other parties to complete the transportation, such delivery to terminate all liability of this company for such package; and also that this company are not to be liable in any manner or to any extent for any loss, danger, or detention of such package, or its contents, or of any portion thereof occasioned by the acts of God, or by any person or persons acting or claiming to act in any military or other capacity, in hostility to the government of the United States, or occasioned by civil or military authority, or by the acts of any armed or other mob or riotous assemblage, piracy, or the dangers incident to a time of war, nor when occasioned by the dangers of railroad transportation, or ocean or river navigation, or by fire or steam. The shipper and owner hereby severally agree that all the stipulations and conditions in this receipt shall extend to and inure to the benefit of each and every company or person to whom the Southern Express Company may intrust or deliver the above-described property for transportation, and shall define and limit the liability thereof of such other companies or person. In no event is this company to be liable for a greater sum than that above mentioned; nor shall it be liable for any such loss, unless the claim therefor shall be made in writing, at this office, within thirty days from this date, in a statement to which this receipt shall be annexed.

"Freight coll.

"For the company: SHACKLEFORD."

Across the left-hand end of said receipt was the following printed matter:

"Insured by Southern Express Company for—
to—only except against loss occasioned by the public enemy.

"For the company—

"Insurance, \$—"

The bills of lading were sent to the consignees at Louisville.

Having thus received the packages, the Southern Express Company transported them by railroad as far as Humboldt, Tennessee, and there delivered them to the messenger of the defendants (who was also their mes-

senger) to complete the transportation to Louisville, and to make delivery thereof to the plaintiffs. For that purpose the messenger took charge of them, placing them in an iron safe, and depositing the safe in an apartment of a car set apart for the use of express companies, for transportation to Louisville. Subsequently, while the train to which the car containing the packages was attached was passing over a trestle on the line of the Louisville and Nashville railroad, and while the packages were in charge of the messenger, the trestle gave way during the night, the train with the express car was thrown from the track, and the car with others caught fire from the locomotive and was burned, together with the money in the safe. The messenger was rendered insensible by the fall, and he continued so until after the destruction was complete. There was some evidence that some of the timber of the trestle seemed decayed.

Upon this state of facts, the learned judge of the circuit court instructed the jury that, "if they believed the package was destroyed by fire, as above indicated, without any fault or neglect whatever on behalf of the messenger or defendants, the defendants have brought themselves within the terms of the exceptions in the bill of lading, and are not liable." And again, the court charged: "It is not material to inquire whether the accident resulted from the want of care, or from the negligence of the Louisville and Nashville Railroad Company and its agents, or not." And again: "But when he (the common carrier) has limited his liability so as to make himself responsible for ordinary care only, and the shipper, to recover against him, is obliged to aver and prove negligence, it must be his negligence, or the negligence of his agents, and not the negligence of persons over whom he has no control. If in his employment he uses the vehicles of others, over which he has no control, and uses reasonable care, that is, such care as ordinarily prudent persons, engaged in like business, use in selecting the vehicles, and if the loss arises from a cause against which he has stipulated with the shipper, he shall not be liable for the same unless it arises from his want of care, or the want of care of his employees." At the same time the learned judge instructed the jury as follows: "Without, therefore, deciding whether or not the evidence adduced in the case tends to establish any want of reasonable or ordinary care on the part of the Louisville and Nashville Railroad Company, I instruct you that such evidence is irrelevant and incompetent, and that you should disregard it, that is, give no more effect to it than if it had not been adduced."

These extracts from the charge, to all of which exception was duly taken, exhibit the most important question in these cases, which is, whether the stipulations of the carriers' receipt or bill of lading relieved them from responsibility for the negligence of the railroad company employed by them to complete the carriage. The circuit court was of opinion, as we have seen, that they did, and practically instructed the jury that, under the modified contract of bailment, the defendants were liable for loss by fire only to the extent to which mere bailees for hire, not common carriers, are liable, that is, that they were responsible only for the want of ordinary care exercised by themselves or those who were under their control. With this we can not concur, though we are not unmindful of the ability with which the learned judge has defended his opinion.

We have already remarked, the defendants were common carriers. They were not the less such, because they had stipulated for a more restricted liability than would have been theirs, had their receipt contained only a contract to carry and deliver. What they were, is to be determined by the nature of their business,

not by the contract they made respecting the liabilities which should attend it. Having taken up the occupation, its fixed legal character could not be thrown off by any declaration or stipulation that they should not be considered such carriers.

The duty of a common carrier is to transport and deliver safely. He is made by law an insurer against all failure to perform this duty, except such failure as may be caused by the public enemy or by what is denominated the act of God. By special contract with his employers, he may, it is true, to some extent, be excused, if the limitations to his responsibility stipulated for are, in the judgment of the law, reasonable, and not inconsistent with sound public policy. It is agreed, however, he can not, by any contract with his customers, relieve himself from responsibility for his own negligence or that of his servants, and this, because such a contract is unreasonable and contrary to legal policy. So much has been finally determined in *Railroad Company vs. Lockwood*, 17 Wall. 357. But can he, by a contract made with those who intrust property to him for carriage and delivery, a contract made at the time he receives the property, secure to himself exemption from responsibility for consequences of the negligence of a railroad company or its agents not owned or controlled by him, but which he employs in the transportation? This question is not answered in the *Lockwood* case. It is raised here, or rather the question is presented, whether a common carrier does relieve himself from the consequences of such negligence by a stipulation that he shall not be liable for losses by fire.

The exception or restriction to the common-law liability introduced into the bills of lading given by the defendants, so far as it is necessary to consider it, is, "that the express company are not to be liable in any manner or to any extent for any loss or damage, or detention of such package or its contents, or of any portion thereof, occasioned by fire." The language is very broad; but it must be construed reasonably, and, if possible, consistently with the law. It is not to be presumed the parties intended to make a contract which the law does not allow. If construed literally, the exception extends to all loss by fire, no matter how occasioned, whether occurring accidentally or caused by the culpable negligence of the carriers or their servants, and even to all losses by fire caused by wilful acts of the carriers themselves. That it can be operative to such an extent is not claimed. Nor is it insisted that the stipulation, though assented to by the shippers, can protect the defendants against responsibility for failure to deliver the packages according to their engagement, when such failure has been caused by their own misconduct or that of their servants or agents. But the circuit court ruled, the exception did extend to negligence beyond the carriers' own, and that of the servants and agents appointed by them and under their control; that it extended to losses by fire resulting from the carelessness of a railroad company employed by them in the service which they undertook, to carry the packages; and the reason assigned for the ruling was that the railroad company and its employees were not under the control of the defendants. With this ruling we are unable to concur. The railroad company, in transporting the messenger of the defendants and the express matter in his charge, was the agent of somebody, either of the express company, or of the shippers or consignees of the property. That it was the agent of the defendants is quite clear. It was employed by them and paid by them. The service it was called upon to perform was a service for the defendants, a duty incumbent upon them, and not upon the plaintiffs. The latter had nothing to do with the employment. It was neither directed by them, nor had

they any control over the railroad company or its employees. It is true, the defendants had also no control over the company or its servants; but they were its employers, presumably they paid for its service, and that service was directly and immediately for them. Control of the conduct of an agency is not in all cases essential to liability for the consequences of that conduct. If any one is to be affected by the acts or omissions of persons employed to do a particular service, surely, it must be he who gave the employment. Their acts become his, because done in his service and by his direction. Moreover, a common carrier who undertakes for himself to perform an entire service, has no authority to constitute another person or corporation the agent of his consignor or consignee. He may employ a subordinate agency; but it must be subordinate to him, and not to one who neither employs it nor pays it, nor has any right to interfere with it.

If, then, the Louisville and Nashville Railroad Company was acting for these defendants, and performing a service for them, when transporting the packages they had undertaken to convey, as we think must be concluded, it would seem it must be considered their agent. And why is not the reason of the rule, that common carriers can not stipulate for exemption from liability for their own negligence and that of their servants and agents, as applicable to the contract made in these cases as it was to the facts that appeared in the case of Railroad Company vs. Lockwood? The foundation of the rule is that it tends to the greater security of consignors, who always deal with such carriers at a disadvantage. It tends to induce greater care and watchfulness in those to whom an owner intrusts his goods, and by whom alone the needful care can be exercised. Any contract that withdraws a motive for such care, or that makes a failure to bestow upon the duty assumed extreme vigilance and caution more probable, takes away the security of the consignors, and makes common carriage more unreliable. This is equally true, whether the contract be for exemption from liability for the negligence of agencies employed by the carrier to assist him in the discharge of his obligations, though he has no control over them, or whether it be for exemption from liability for a loss occasioned by the carelessness of his immediate servant. Even in the latter case he may have no actual control. Theoretically he has; but most frequently, when the negligence of his servant occurs, he is not at hand, has no opportunity to give directions, and the negligent act is against his will. He is responsible because he has put the servant in a place where the wrong could be done. It is quite as important to the consignor, and to the public, that the subordinate agency, though not a servant under immediate control, should be held to the strictest care, as it is that the carrier himself and the servants under his orders should be.

For these reasons, we think, it is not admissible to construe the exceptions in the defendants' bills of lading as excusing them from liability for the loss of packages by fire, if caused by the negligence of the railroad company to which they confided a part of the duty they had assumed.

There are other reasons of weight which deserve consideration. Express companies frequently carry over long routes, at great distances from the places of destination of the property carried, and from the residence of its owners. If, in the course of transportation, a loss occurs through the want of care of managers of public conveyances which they employ, the carriers or their servants are at hand. They are best acquainted with the facts. To them those managers of public conveyances are responsible, and they can obtain redress much more conveniently than distant owners

of the property can. Indeed, in many cases, suits by absent owners would be attended with serious difficulties. Besides, express companies make their own bargains with the companies they employ, while they keep the property in their own charge usually attended by a messenger. It was so in the present case. The defendants had an arrangement with the railroad company, under which the packages of money, inclosed in an iron safe, were put in an apartment of a car set apart for the use of the express company. Yet, the safe containing the packages continued in the custody of the messenger. Therefore, as between the defendants and the railroad company, it may be doubted whether the relation was that of a common carrier to his consignor, because the company had not the packages in charge. The department in the car was the defendants' for the time being. And if the defendants retained the custody of the packages carried, instead of trusting them to the company, the latter did not insure the carriage. *Miles vs. Cattle*, 6 Bingham, 743; *Towers vs. The Utica & Syracuse R. R. Co.*, 7 Hill, N. Y. 47; *Redfield on Railways*, sec. 74.

Now, can it be a reasonable construction to give to the contract between the defendants and the plaintiffs, that the former, who had agreed to carry and deliver the packages at Louisville, reserved to themselves the right to employ a subordinate carrier, arrange with him that he should be responsible only for ordinary vigilance against fire, and by that arrangement relieve themselves from what, without it, would have been their clear duty? Granting that the plaintiffs can sue the railroad company for the loss of the packages through its fault, their right comes through their contract between it and the defendants. They must claim through that. 6 How. 381. Had the packages been delivered to the charge of the railroad company, without any stipulation for exemption from the ordinary liability of carriers, it would have been an insurer both to the express company and to the plaintiffs. But as they were not so delivered, the right of the plaintiffs to the extreme constant vigilance during all stages of the carriage is lost, if the defendants are not answerable for the negligence of the railroad company, notwithstanding the exception in their bills of lading. We can not close our eyes to the well known course of business in the country. Over very many of our railroads the contracts for transportation of goods are made, not with the owners of the roads, nor with the railroad companies themselves, but with transportation agencies or companies which have arrangements with the railroad companies for the carriage. In this manner some of the responsibilities of common carriage are often sought to be evaded. But in vain. Public policy demands that the right of the owners to absolute security against the negligence of the carrier, and of all persons engaged in performing the carrier's duty, shall not be taken away by any reservation in the carrier's receipt, or by any arrangement between him and the performing company.

It has been urged on the part of the defence that, though the contract does not attempt to exempt, and could not have exempted the express company from liability for loss occasioned by the neglect of itself or its servants, yet, when it is sought to charge the company with neglect, it must be such as it is responsible for upon the general principles of law, and that upon those principles no one is responsible for damages occasioned by neglect unless it be the neglect of himself, his servants, or agents. The argument mistakes, we think, when it asserts that upon the general principles of law no one is responsible for the consequences of any neglect except his own or that of his agents or servants. Common carriers certainly are, and for very substantial reasons. These defendants, it is agreed,

were common carriers, and they remained such after the exception in their receipt. If it be said the exception reduced their responsibility to such an extent as to make them liable only for such neglect as fastens a liability upon persons who are not common carriers, the answer is, such an averment assumes the very thing to be proved. And even if the argument were sound, the question would still remain, whether the railroad company, employed by the defendants to effect the carriage, is not properly to be regarded as their agent, though not under their control. That question we have already considered.

Again, it is urged that though the defendants remained common carriers, notwithstanding their contract, their responsibility was limited by their receipt to that of an ordinary bailee for hire. And, as such a bailee is not held liable for the neglect of persons over whom he has no control, it is argued that these defendants are not liable for the negligence of the railroad company. This also assumes what can not be admitted. Although we are told, all the authorities agree that, when a common carrier has, by special contract, limited his liability, he becomes, with reference to that particular transaction, an ordinary bailee—a private carrier for hire—or reduces his responsibilities to those of an ordinary bailee for hire, yet we do not find that the authorities assert that doctrine, if by the phrase "that particular transaction" is meant the undertaking to carry. Certainly, those to which we have been referred do not. We do not deny that a contract may be made which will put a common carrier on the same level with a private carrier for hire, as respects his liability for loss caused by the acts or omissions of others. The consignor may, by contract, restrain him, may direct how and by what agencies he shall carry. Under such an arrangement he may become a mere forwarder, and cease to be a carrier. But what we have to do with in these cases is, whether the contract proved has that operation. We have already said we think it has not. The exception in the bills of lading has sufficient to operate upon without being a cover for negligence on the part of any persons engaged in the service undertaken by the carriers. It exempts the defendants from responsibility for loss by fire caused by the acts or omissions of all persons who are not agents or agencies for the transportation. That is a large restriction, and beyond that, in our judgment, the exception in the present case does not extend.

To the opinion we have thus expressed, we find direct support in the case of *Hooper v. Wells, Fargo & Co.*, 27 Cal. 11. There an express company had undertaken to transport gold dust and bullion from Los Angeles to San Francisco, and deliver to address. The receipt for the property contained the following stipulations: "In no event to be liable beyond our route, as herein receipted. It is further agreed, and is part of the consideration of this contract, that Wells, Fargo & Co. are not to be responsible except as forwarders, nor for any loss or damage arising from the dangers of railroad, ocean, or river navigation, fire, etc., unless specially insured by them and so specified in this receipt." In the course of the transportation the messenger of the carriers, who had the property in charge, took on board a steam-tug, for the purpose of placing it on a steamer bound to San Francisco. On the way to the steamer the boiler of the steam-tug exploded, in consequence of carelessness of its officers, and the gold dust and bullion were thereby lost. The steam-tug did not belong to the express company, nor was it or its officers under their control. Yet the court adjudged that the managers and employees of the steam-tug were in legal contemplation, the managers and employees of the carrier, and that the restrictive clause in the receipt did not exempt the carriers from liability for loss

occasioned by the carelessness of those employees. To the same effect is the case of *Christensen et al. v. The American Express Company*, 15 Minn. 270; and the case of *Machu v. The London and Southwestern Railway Company*, 2 Exch. 415, though arising under the carrier acts of 11 George 4th, and 1 William 4th, is very analogous. The statute declared that the carrier should be liable to answer for the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his employ. The court considered that all parties actually employed in doing the work which the carrier undertook to do, either by himself or his servants, were to be regarded as his servants within the meaning of the act. Baron Rolfe said, the right as against the carriers arises, not from the relation of master and servant, but by virtue of the contract into which they have entered to deliver the goods. This was said in answer to an argument like the one relied upon in this case, that the relation of master and servant could not exist between the carriers and the servants of a sub-contractor.

The other objections urged against the charge given by the court below to the jury require but brief notice.

We find no error in what the circuit judge said upon the question whether the bills of lading, with the exceptions, constituted the contract between the parties. The charge, in this particular, is justified by very numerous authoritative decisions: *York County v. Central Railroad Company*, 3 Wall. 107; *Grace v. Adams*, 100 Mass. 505; *Wells v. The Steam Nav. Co.*, 2 Comstock, 204; *Dorr v. New Jersey Steam Nav. Co.*, 1 Kernan, 485; 6 How. 344; 3 Wall. 107; 6 Blatchf. 64; *Kirkland v. Dinsmore*, 62 N. Y. 161. Nor was there error in the instructions given respecting the iron safe. Taken as a whole, it was correct.

The charge covered the whole case, and except in those particulars in which we have indicated our opinion that it was erroneous, we find no just reason to complain of it. But for the errors we have pointed out, new trials must be awarded. The judgment in each case is reversed, and the record is remitted, with directions to award a venire de novo.

NOTE.—The ruling of the court below in this case was published in 1 Cent. L. J. 448, and called forth considerable criticism from correspondents. See 7 Cent. L. J. 446, 498, 500, 570, 572.

STATUTE OF LIMITATIONS — NON-RESIDENCE.

SAVAGE vs. SCOTT ET AL.

Supreme Court of Iowa, December Term, 1876.

HON. WM. H. SEEVERS, Chief Justice.

" JAMES G. DAY,	Judges.
" JAMES H. ROTHROCK,	
" JOSEPH M. BECK,	
" AUSTIN ADAMS,	

1. STATUTE OF LIMITATIONS — NON-RESIDENCE. — The Iowa code provides that "the time during which a defendant is a non-resident of the state shall not be included in computing any of the periods of limitation." In the case in judgment, one S., on June 28, 1857, executed a note payable ten months after date, and, six months later, a mortgage to secure it. For more than four months after the note became due, the mortgagor was in the State of Iowa, voted at an election, and was engaged in business there, afterwards removing to Pennsylvania, where he died. Held, That during the time he was in Iowa his residence was there, and the statute of limitations ran against him.

2. RESIDENCE in the state, and not citizenship or domicile, determines the fact of the running of the statute.

3. EFFECT OF DEATH. — The disability of non-residence is removed by death. The statute ceases to run upon the debtor becoming a non-resident; when that disability is

removed, it resumes its operation. To be a non-resident of the state, one must be a resident elsewhere.

APPEAL from Washington District Court.

Action to foreclose a mortgage. The plaintiff claims to recover, in addition to the amount due on the promissory note which is secured by the mortgage, the sum of \$56.20, paid by him for taxes levied upon the real estate covered by the incumbrance. The petition shows that the mortgagor was, at the time of the execution of the mortgage, a non-resident of the state, and continued to be to the time of his death. The defendants are his heirs and a grantee of his widow's interest, and are shown by the petition to be non-residents. The answer of the defendants, among other matters, alleges that the mortgagor, at the date of the execution of the incumbrance, was a resident of the state, and so continued for a time after the note secured by the mortgage became due, and then removed to Pennsylvania, and afterwards died in that state, and more than ten years have elapsed after his death was known to plaintiff; that he left no other property besides the real estate covered by the mortgage; and that administration has not been taken out upon his estate. The cause was submitted to the court, and the following finding of facts was made:

First. That one William Scott, on the 20th day of June, A. D., 1857, purchased of the plaintiff lots, numbers eight and nine (8 and 9), in sub-lot number fourteen (14), in the town of Washington, Iowa, and on that day executed his promissory note for the purchase-money to the plaintiff, for the sum of three hundred and fifty dollars, and which said note is in words and figures following, that is to say:

"June 20, 1857.

"Ten months after date, I promise to pay to Alexander Savage, the sum of three hundred and fifty dollars, with ten per cent. from date, for value received. Witness my hand.

WM. SCOTT."

Second. That afterwards, and on the 16th day of January, A. D., 1858, said Scott, to secure the payment of said note, executed and delivered to plaintiff a mortgage upon said lots, to be void on payment of the note made by William Scott to Alexander Savage, dated June 20, 1857, for \$350. Mortgage dated January 16, 1858, and acknowledged and recorded January 18, 1858.

Third. That afterwards the plaintiff removed from the state of Iowa to California, and one Henry Savage, a brother of plaintiff, either paid or caused to be paid in his name, or redeemed or caused to be redeemed from tax sale in his name, the taxes assessed against the said lots, and also caused the lots to be assessed in his name. That he thus paid out the sum of fifty-six dollars and twenty-three cents in all. That such payments were made without the knowledge of the plaintiff, and the money so expended was the money of the said Henry Savage. But a short time before this suit was commenced, the plaintiff paid his brother a visit, and was then informed of what his brother had done, and was satisfied with, or approved the same, and then employed his brother to look after his interest in, and claim upon the lots.

Fourth. That William Scott, being a married man, left his home in Washington county, Pennsylvania, and came to Washington county, Iowa, in April, A. D., 1857, and entered into business, and remained in said county, and engaged in said business until sometime in September or October, 1858, at which time he returned to Pennsylvania, with the intention of returning with his family to Iowa. That, during the time he was in Iowa, he voted at one of the elections, and was, during that time, engaged with others in partnership in running a saw-mill, and during that time frequently spoke of his

intention of making Iowa his permanent home; and for that purpose had a bill of lumber sawed to build a house for a home upon the lots that were mortgaged to plaintiff. That, shortly after his return to the state of Pennsylvania, he offered to vote there and his vote was challenged; but, whether he was permitted to vote, does not appear. That said Scott never returned to Iowa, being taken sick shortly after reaching his old home in Pennsylvania, and never recovering fully from such sickness, but died February 11, 1862, intestate, leaving a widow and two children, the defendants herein, as his only heirs at law surviving him.

Fifth. That the defendant R. M. Stinson is, by purchase from the widow of said William Scott, the owner of her interest in the said lots.

Sixth. That from the time the said note became due, and up to September or October, A. D. 1858, thereafter, the said William Scott was living in Washington county, Iowa, the place where the note was executed, and within the jurisdiction of the courts of this state, and suit might have been instituted upon said note and mortgage against him, and personal service had upon him.

Seventh. That the widow and children of said William Scott have never lived in Iowa or been in this state.

Upon these facts the district court decided that plaintiff was not entitled to recover for the taxes paid, and that his action upon the note and mortgage was barred by the statute of limitations, and entered a decree accordingly. Plaintiff appeals.

Stubbs & Leggett, and G. W. Howe, for Appellants; Ed. W. Stone, for Appellees.

BECK, J., delivered the opinion of the court:

I. Under the statute of limitations of this state, actions of this kind are barred in ten years. Code, § 2529, p. 4. But it is provided that "the time during which a defendant is a non-resident of the state shall not be included in computing any of the periods of limitation" prescribed in the statute. Code, § 2533. Under this statute, the period of limitation having commenced to run in favor of a resident debtor, is arrested by his becoming a non-resident. It becomes important to determine whether the statute began to run against the claim which is the foundation of this action. From the court's finding of facts, it appears that, for more than four months after the note became due, the mortgagor was in this state, voted at an election, was engaged in business, and had the intention of making his permanent home here. He was surely a resident of this state, so far as to be subject to its jurisdiction, and to be capable of exercising all the rights of citizenship. It can not be doubted that during the time of his residence, he was subject to process of the courts, and an action could have been brought against him. We need not inquire in what state he held a domicile; he had a residence here of the character that would subject him to process of the courts of this state. *Love v. Cherry*, 24 Iowa, 209. While he held this residence, the statute of limitations ran against the note and mortgage. That the statute runs in favor of all residents of the state can not be questioned, for the plain reason that the section 2533, above cited, declares it shall not run in favor of a non-resident.

That residence in the state, and not citizenship or domicile, determines the fact of the running of the statute can not be doubted. The distinction which the law draws between the place of residence and that of domicile or citizenship is plain. A man may have more than one place of residence; but he can have but one domicile, and can hold citizenship in but one state. *Love v. Cherry*, 24 Iowa, 204. Personal actions in this state must be brought in the county wherein the de-

defendant *actually resides*. Code, § 2586. Of course, one having an actual residence in this state may be sued in our courts. We conclude that the note and mortgage, under the facts found by the court, could have been sued upon in this state, at any time for near five months after maturity, in a personal action against the mortgagor, and that the statute of limitation ran for that time.

II. The statute ceases to run upon the debtor becoming a non-resident; when that disability is removed, it resumes its operations. To be a non-resident of this state, one must be a resident elsewhere. The word non-resident implies that one so described holds a residence in another place. But we can not say of a deceased person, that he is a non-resident; for he holds a residence. The disability of non-residents is removed in case of death.

This view is supported upon the consideration that, on the death of the debtor, claims which, in his life, were enforced by personal actions against him, became the subject of proceedings prescribed by law against his administrator or executor. The personal representative takes the place of the deceased. The creditor has it in his power, if property of the estate be found here, to cause an administrator to be appointed without delay, against whom proceedings may be at once instituted. His legal remedy, which was suspended by the debtor becoming a non-resident, is revived at the debtor's death. From the moment the remedy is revived, the statute of limitations begins again to run. These views, and the conclusion we reach, are sustained by the following authorities: *Christophus v. Gaw*, 6 N. Y. [2 Seld.] 61; *Teal v. Ayres*, 9 Tex. 588.

III. The plaintiff seeks, in this action, to foreclose the mortgage for the amount paid by him for taxes, with interest, as well as the amount of the promissory note, secured by the incumbrance. This relief can not be granted. The mortgage contains no condition for securing the sum advanced for taxes, or any other debt, except that evidenced by the promissory note. The security can not be extended to cover debts not provided for in the mortgage, in the absence of facts and equities, which would require a court of chancery to give it such effect. Such equities do not exist in this case.

No other points arise in the case for our determination. The judgment of the district court is

AFFIRMED.

JURISDICTION OF EQUITY TO RESTRAIN PUBLICATION.

LIFE ASSOCIATION OF AMERICA vs. BOOGHER.

St. Louis Court of Appeals, December, 1876.

HON. THOS. T. GANTT, Presiding Judge.
" EDWARD A. LEWIS,
" ROBERT A. BAKEWELL, } Judges.

1. LIBEL.—DEFENDANT INSOLVENT.—INJUNCTION.—Courts of Equity have no power to enjoin the publication of a threatened libel, though its publisher be insolvent, and the damage, therefore, irreparable.

2. CONSTITUTION OF MISSOURI.—Such power is expressly denied in Missouri by the terms of the Constitution.

APPEAL from St. Louis Circuit Court.

I. Z. Smith and H. A. Clover, for appellant; *W. H. Russell, R. W. Goode and Marshall & Barclay*, for respondent.

GANTT, J., delivered the opinion of the Court:

The Life Association of America, a corporation en-

gaged in the business of life assurance at St. Louis, filed its petition charging that Boogher and one Taylor had been for a long time engaged in the composition, publication and circulation of false, slanderous, malicious and libelous statements (setting them forth) respecting the plaintiff, and that they threatened still further to circulate and publish orally, in writing, and in print, said false, slanderous, malicious and libelous statements, for the purpose of injuring, and in order to levy blackmail on the plaintiff; that the said Boogher and Taylor were wholly insolvent and irresponsible, and that plaintiff had therefore no available recourse to an action for damages; and it asked for a restraining order to prevent the further publication of the libel, and the infliction on plaintiff of irreparable injury thereby.

This petition was verified by affidavit, and the Court granted a preliminary injunction, which was afterwards dissolved upon a demurrer and motion, at the return term. The plaintiff dismissed the suit as to Taylor.

The demurrer assigned for reasons, that the petition showed no case for equitable relief; that it prayed for what the Constitution of the State forbade; that a court of equity had no jurisdiction to restrain the publication of a libel, and that the application for a restraining order was not seasonably made. The Court sustained the demurrer, dissolved the injunction, dismissed the petition, and assessed damages on the injunction bond. Plaintiff appealed to this Court.

We are told in the petition, by way of aggravating the offense of the libeler, that his purpose was to levy "blackmail" on the plaintiff. No explanation is given of this phrase, and its use is hardly justifiable; for it can not be considered quite intelligible. It certainly can not be called plain English. Originally, we learn from philological authority, it had a definite but provincial meaning familiar to those who inhabited the country periodically devastated by Highland robbers. It was, indeed, the tribute levied by these last on the peaceable and unwarlike inhabitants of the lowlands of Scotland, which, being paid promptly and at regular intervals, was a substitute for complete spoliation. In this country, the phrase has been sometimes used in a metaphorical sense to signify any unlawful exaction of money by an appeal to the fears of the victim; and we may conjecture that this use of it was intended by the draughtsman of this petition. But this conjecture can not supply the demand made by the universal rule of pleading that the complaint should set forth in plain language a statement of the facts constituting the plaintiff's cause of action. In the case before us, no change will have been made in the opinion we express by this failure to explain the circumstances of aggravation which are charged; for enough is stated to inform us that defendant has uttered a malicious, false, scandalous and libelous statement respecting the plaintiff, and that, with the purpose of inflicting injury on the plaintiff, defendant purposes and threatens to repeat and enlarge the wrong and injury already inflicted; that the resulting loss to the plaintiff will be great, and irreparable by civil action because of the insolvency of the defendant; and thereupon the aid of a court of justice is claimed to prevent that aid which, if perpetrated, it can not give compensation.

It is obvious that, if this remedy be given on the ground of the insolvency of the defendant, the freedom to speak and write, which is secured by the Constitution of Missouri to all its citizens, will be enjoyed by a man able to respond in damages to a civil action, and denied to one who has no property liable to an execution. We are of opinion that this discrimination was not intended by the framers of the organic law. It never was the purpose of them, or of those who have

most strenuously advocated the freedom of the press or of speech, that any person should have unbridled license of tongue or pen. It is an offense against the peace of society that malicious libels should be uttered, even if true. The law does not justify the gratification of malevolent feelings by even true charges calculated to wound the feelings, blast the character, and exasperate beyond endurance the passions, of their object. The guilt of the libeler is aggravated almost infinitely by the falsehood of the accusation; but it is no complete defense in a criminal prosecution that the defendant has stated no more than he stands ready to prove. In such a case as this petition states, there is a punishment provided by the criminal law. It is no answer to say that this punishment is not adequate. Courts do not listen to such objections. It is undeniable that in such a case as the petition shows, the party slandered may have an action for damages. But in such an action, irrespective of the suggestion of the absolute insolvency of the defendant, there is much room for saying that the legal remedy falls short of making full compensation for injury done, or of giving full protection against injury threatened. To infer from this that recourse may be had to the preventive jurisdiction of a court of equity, is clearly not allowable. No human institutions are perfect. That a judgment for damages is less efficacious to compensate or to deter when the defendant is insolvent, is largely due to the prohibition of imprisonment for debt. The exemption of a limited amount of a debtor's property from execution, will, in many instances, disarm a judgment of its terrors, at least in part. Yet these exemptions of the person and property of the defendant are part of the system under which we live, and courts of justice sit to administer, not to criticise this system. It remains true that a judgment for damages against any one, though incapable of enforcement so long as his pecuniary condition is very low, can seldom or never be a matter of indifference to the judgment-debtor; that even when capable of complete enforcement, its moral effect will vary with the peculiar disposition of the defendant, and that the practical result is that the difference between the influence of such a judgment upon a person in a condition of insolvency, and one in prosperous circumstances, is only one of degree.

In Great Britain, there is no such thing as what we understand by the term organic law. The king, lords and commons of that country can, whenever so minded, effect any conceivable change in the institutions of the United Kingdom. Hence, there is no fundamental or constitutional law in that country, securing freedom of speech or of the press, though there is no land in which that freedom is practically more assured. But not even in that country, where the rigid restraints which bind our government do not exist, have any of its courts, since the abolition of the Court of Star Chamber, asserted the jurisdiction which the plaintiff invokes. When, in the hurry of a trial at *nisi prius*, an expression fell from the lips of the presiding judge, tending to the assertion of such a jurisdiction, or rather imagining such a jurisdiction to be vested in another court, the intimation, though plainly *obiter dictum*, alarmed the vigilance of the English bar, and occasioned an unmistakable protest. In the case of *Du Bost vs. Beresford*, 2 Campb., 511, Lord Ellenborough, at *nisi prius*, let such an expression fall. This was in 1810, a time when Tory views of government were in the ascendant. In the edition of the *State Trials*, by Howell, in 1816 (vol. 20, note to page 798), the learned and careful editor, annotating the case of *Rex vs. Horne*, tried before Lord Mansfield in 1777, says: "Not unconnected with the law of libel upon which Mr. Horne said so much in this case, is the dictum of Lord

Ellenborough in the case of *Du Bost vs. Beresford*, 2 Campbell's *Nisi Prius*, R. 511, being an action for destroying a picture which was publicly exhibited, but which was largely defamatory of a gentleman and his wife, who was defendant's sister, Lord Ellenborough (C. J. B. K.) said: 'If it was a libel upon the persons introduced into it, the law can not consider it valuable as a picture. Upon an application to the Lord Chancellor, he would have granted an injunction against its exhibition, and the plaintiff was both civilly and criminally liable for having exhibited it.'" "I have been informed by very high authority," proceeds Mr. Howell, "that the promulgation of this doctrine relating to the Lord Chancellor's injunction excited great astonishment in the minds of all the practitioners of the courts of equity, and I had apprehended that this must have happened, since I believe there is not to be found in the books any decision or any dictum posterior to the days of the Star Chamber, from which such doctrine can be deduced, either directly or by inference or analogy, unless, indeed, we are to except the proceedings of Lord Ellenborough's predecessor, Scroggs, and his associates, in the case of *Henry Care*, in which case it was ordered that the book entitled the *Weekly Packet of Advice from Rome*, or the *History of Popery*, be not further printed or published by any person whomsoever." The case of *Care* is to be found in 7 Howell's *State Trials*, p. 1111. A case was tried in 1690, in the reign of Charles II.; Scroggs, C. J., presided, and Jeffries prosecuted. This, it seems, furnished the only precedent since the abolition of the Court of Star Chamber, on which Lord Ellenborough could have relied. The law, as laid down in England by Lord Eldon, in 2 Swanston 412, 418, *Gee vs. Pritchard*, and by Lord Langdale, in 11 Beavan, p. 112, *Clark vs. Freeman*, and in New York by Chancellor Walworth, in 8 Paige, 24, *Brandreth vs. Lance*, utterly repudiates the decision of Scroggs and the unguarded dictum of Ellenborough. The last authority is that of an American court, which treats almost contemptuously the suggestion that the publication of a libel may be enjoined. To the same effect, see § 948 (a) of 2 Story *Comm. on Eq. Jurisp.* (11th edition).

No case is cited by the learned counsel for appellant in which the jurisdiction here claimed has been exercised. All that they venture to suggest is, that the various English courts which have refused to exercise such a jurisdiction have placed their refusal on grounds which do not make such refusal certainly opposite to the circumstances shown by this petition. The refusal has been uniform. The reasons assigned for it have been various, according to the peculiarities of the cases in which they were given. To argue from the qualifications of so many concurring refusals, that it may be inferred that, but for the qualifications, the refusals would not have been made, would be an exceedingly unsafe line of argument anywhere. In Missouri, where we are expressly forbidden by the Constitution to assume the power we are asked by the plaintiff to exercise, our answer can not be doubtful. It is hardly necessary to quote the familiar language of our organic law, which has always declared "that every person may freely speak, write or print on any subject, being responsible for the abuse of that liberty." If it be said that the right to speak, write, or print, thus secured to every one, can not be construed to mean a license to wantonly injure, and that by the jurisdiction claimed it is only suspended until it can be determined judicially whether the exercise of it in the particular case be allowable, our answer is, that we have no power to suspend that right for a moment or for any purpose. The sovereign power has forbidden any instrumentality of the government it has instituted to limit or restrain this right except by the fear of the penalty, civil or

criminal, which may wait on its abuse. The General Assembly can pass no law abridging the freedom of speech or of the press; it can only punish the licentious abuse of that freedom. Courts of justice can only administer the laws of the State, and of course can do nothing by way of judicial sentence which the General Assembly has no power to sanction. The matter is too plain for detailed illustration.

The judgment of the Circuit Court is affirmed. All the judges concurring.

NOTE.—See a late case in England, *Mackett v. Commissioners of Herne Bay*, 3 Cent. L. J. 535, 24 W. R. 845, where an injunction was issued restraining the preaching of a sermon, and the cases there cited. *Daw v. Ely*, 17 W. R. 245, L. R., 7 Eq. 49; *Tichborne v. Mostyn*, 15 W. R. 1072, L. R., 7 Eq. 55; *re Cheltenham and Swansea R. R. v. Wayne Co.*, 17 W. R. 463, L. R., 8 Eq. 580.

RIGHT OF MORTGAGOR TO INCOME FROM MORTGAGED PREMISES—STATE COMITY.

MISS. VALLEY & WESTERN R. R. vs. UNITED STATES EXPRESS CO.

Supreme Court of Illinois.

HON. JOHN M. SCOTT, Chief Justice.

"SIDNEY BREESE,
"W. K. MCALLISTER,
"JOHN SCHOLFIELD,
"P. H. WALKER,
"B. R. SHELTON,
"ALFRED M. CRAIG,

Associate Justices.

1. RIGHT OF MORTGAGOR TO INCOME FROM PREMISES.—The mortgagor is entitled to all profits arising out of the mortgaged premises, until foreclosure. A railroad company is entitled to receive the income of the road until default, and possession taken by trustees under mortgage. *Gilman et al. v. Ill. & Miss. Tel. Co.*, 3 Cent. L. J. 398, followed.

2. STATE COMITY.—Comity will in no case require a state court to follow other than what it regards as the clearly established law of the foreign jurisdiction with reference to the contract to be affected by it. Where the contract is affected by the laws of two foreign jurisdictions, the court will adopt that construction which it believes to be authorized by law without regard to where the contract was made.

APPEAL from Adams County.

SCHOLFIELD, J., delivered the opinion of the court.

Appellant having mortgaged its property and income to trustees, to secure the payment of certain indebtedness, the question is whether its earnings, after the execution of the mortgage, and before the foreclosure proceedings are instituted or possession is taken by the trustee, can be recalled by the other creditors.

The mortgage conveys to the trustees the "rights, powers, franchises, emoluments, income and property" of whatever description, and no objection is taken to appellant's capacity to convey whatever can be conveyed by such an instrument. The mortgage provides that, "if default be made in the payment of interest or principal becoming due on the bonds secured, and if such default shall continue for six months, it shall be the duty of the trustees, upon request of a certain portion of the bondholders" to enter forthwith upon the railroad property, etc., and they are authorized to hold, use, or operate the same until all overdue coupons are paid, or until the road and its property shall be sold pursuant to the power in the mortgage, or under a decree of court, during which time they are to receive the tolls, freights, income, rents, issues and profits thereof. But until default by appellant, it is to possess and use the road and property, and receive the rents, profits and income arising therefrom.

When the trustees are in possession, they are empowered to make useful alterations, additions, and improvements and needful repairs which, there being no other provision in that respect, would have to be paid out of the earnings of the road. And before possession by the trustees, the necessary current expenses, it is conceded, would have to be paid by appellant out of the earnings of the road; but it is claimed by appellant that, subject to the payment of such necessary expenses, the income passes by the mortgage to the trustees, before, as well as after, possession taken by them.

In *Galena and Chicago Union Railroad Company v. Martin*, 26 Ill. 121, it was held, where a corporation had given a mortgage or deed of trust of all its property, tolls, incomes, franchises, etc., to secure the payment of principal and interest due on its bonds, the revenues so pledged are not liable to a garnishee process by its judgment-creditors; but in that case, the income in question was earned and derived by the trustees under the deed of trust or mortgage, whilst they were in possession of the property; and, in that respect, it is not analogous to the present case. The rule at common law, and followed by this court, is that the mortgagor is not required to account to the mortgagee for rents and profits while he remains in possession. *Moore v. Titman*, 44 Ill. 370.

From the language of the mortgage, which we have quoted, we are unable to discover an intention to vest a right to the income in the trustees, until default in the condition, and possession taken by the trustees on account thereof. In that event, they are to receive the tolls, freights, income, rents, issues and profits; but, until then, these are to be received by the mortgagor.

It is true, it is its duty to apply the income, after the payment of the current expenses, including necessary repairs and improvements, to the liquidation of the interest due upon its bonds; but this obligation no more carries title to the particular money received as income to the bondholders or trustees, than does the obligation to pay a debt in ordinary cases carry title to the creditors after the money is in the debtor's pocket. The fact that the mortgagor is in possession, operating the road, renders it indispensable that it shall pay current expenses and for necessary repairs and improvements, and that it shall exercise its judgment and discretion as to the extent repairs and improvements shall be made; and this can only be paid out of the income. It is inconsistent with such control over the income that it shall be the property of the trustees. The Supreme Court of the United States fully express our views in considering a question in all respects the same as that before us in *Gilman et al. v. Ill. & Miss. Tel. Co. et al.*, and *Coykendall, garnishee, v. same*, two cases considered together, 3 Cent. L. J. 398. The court say: "It is clearly implied in these mortgages that the railroad company should hold possession and receive the earnings until the mortgagees should take possession or the proper judicial authority should interpose. Possession draws after it the right to receive and apply the income. Without this the road could not be operated and no profit could be made. Mere possession would have been useless to all concerned. The right to apply enough of the income to operate the road will not be questioned. The amount to be so applied was within the discretion of the company. The same discretion extended to the surplus. It was for the company to decide what should be done with it. In this condition of things the whole fund belonged to the company, and was subject to its control. It was, therefore, liable to the creditors of the company as if the mortgages did not exist. They in no wise affected it. If the mortgagees were not satisfied, they had the remedy in their own hands. They could at any moment invoke the aid of the law, or interpose

themselves without it. They did neither." And to the same effect is *The Galveston Road v. Cowdrey*, 11 Wallace, 482.

But appellant is a corporation created by acts of the legislatures of the States of Iowa and Missouri; and its road is located in those states, although its cars are also run over the bridge which crosses the Mississippi River at Quincy, and into this state: and it is insisted that the Supreme Court of Iowa has decided that the income belongs to the trustees and can not be recalled by process of garnishment at the instance of creditors, and that comity requires that we should follow the construction given to the mortgage by the Supreme Court of Iowa. The ruling in *Dunham v. Isett et al.*, 15 Iowa, 284, seems to go to the extent claimed, although the distinction between income received by trustees in possession, and income received by the mortgagor before possession taken by the trustees, does not appear to have been discussed in argument or considered by the court. Conceding the ruling, however, to be the settled doctrine of the court, is this a case in which comity requires us to follow it? It is not shown that the mortgage was executed in Iowa, and there can be no greater presumption that it was executed there, because it applies to property which has its *situs* there, than that it was executed in Missouri; for a part of the property—whether the greater or the less is unimportant—has its *situs* in that state. The question is not shown to have ever been adjudicated in Missouri; and what the rulings of her courts may be in that respect, remains to be determined in the future. The common law is in force there, and if we were to presume at all, we should presume it will, when the proper case shall arise, be held there, as it has been by the Supreme Court of the United States. In that event, we certainly could not be called upon to follow the ruling in Iowa; for comity would equally demand we should follow the ruling in Missouri, and the only course would be for us to pursue our own views of the law. But comity, in no case, requires us to follow other than what we regard as the clearly established law of the foreign jurisdiction with reference to the contract to be affected by it. Here, so far as the question before us is concerned, the contract is affected by the laws of two foreign jurisdictions. Neither is superior to the other, and the ruling in one may be diametrically opposed to the rulings on the other—one we know, and the other we do not know. Under these circumstances, is it not plainly our duty to adopt that construction which we believe to be authorized by law, without regard to where the contract was made? We think the case, from the peculiar circumstances, is one in which the obligations of inter-state comity, in the application of the law, can not be appealed to.

Treating the road, as operated when the income was produced, as a unit, it is affected by the laws of this state as well as by those of Iowa and Missouri, and there certainly is nothing that requires us, in that view, to adopt and enforce the Iowa ruling.

The judgment is affirmed.

FORM OF ACTION AGAINST TRUSTEES OF CORPORATION.

HORNOR vs. HENNING ET AL.

Supreme Court of the United States, October Term, 1876.

1. STATUTE MAKING TRUSTEES OF CORPORATION PERSONALLY LIABLE—FORM OF ACTION.—The act of Congress (16 U. S. S. 98) under which certain corporations are organized in the District of Columbia, contains a provision that, "if the indebtedness of any company organized under

this act shall at any time exceed the amount of its capital stock, the trustees of such company assenting thereto shall be personally and individually liable for such excess to the creditors of the company." *Held*, That an action at law cannot be sustained by one creditor among many for the liability thus created, or for any part of it, but that the remedy is in equity.

2. FUND FOR BENEFIT OF ALL CREDITORS.—This excess constitutes a fund for the benefit of all the creditors, so far as the condition of the company renders a resort to it necessary for the payment of their debts.

IN ERROR to the Supreme Court of the District of Columbia.

Mr. Justice MILLER delivered the opinion of the Court.

The plaintiff in error, who was plaintiff below, had judgment against him on demurrer to his declaration. The substance of the declaration is that he is a creditor of the Washington City Savings Bank; that the bank had incurred an indebtedness of \$850,000 in excess of the amount of its capital stock, with the assent of the defendants, who were the trustees of said bank, by reason whereof a right of action had accrued to plaintiff to have and recover the amount of his debt, to wit, \$4,000.

The act of Congress of May 5, 1870 (16 U. S. S. 98), authorizes the formation of corporations for various purposes within the District of Columbia by the voluntary association of individuals, who shall pursue the directions of the statute on the subject. Section four of that act provides for manufacturing, agricultural, mining and mechanical corporations, and contains several provisions on the subject of the liability of the stockholders and of the trustees who manage these corporations. One of these is that, "if the indebtedness of any company organized under this act shall at any time exceed the amount of its capital stock, the trustees of such company assenting thereto shall be personally and individually liable for such excess to the creditors of the company." By the second section of an act of the same session, passed June 17, 1870 (16 U. S. Statutes, 153), it was enacted that savings banks might be organized under the provisions of section four of the act first mentioned, which contains the clause above recited, and it is on the liability of the trustees declared in this clause that plaintiff bases his cause of action.

The demurrer questions the right of a single creditor, among many, to bring his separate action at law for his own debt and recover a judgment for it against the trustees, though the allegations of his declaration be true.

If there exists an indebtedness of \$850,000 in excess of the capital stock (which is alleged to be \$50,000), it is clear that there must be other creditors than plaintiff; and as plaintiff's account, filed as part of the declaration, shows that he claims as a depositor in the bank, it is a reasonable inference that there are a great many other creditors, and that most of them are depositors of small sums. Under these circumstances, conceding the liability of the defendants, several questions press themselves on our attention as to the nature and extent of this liability and the mode of its enforcement. Taking the terms of the statute literally, the trustees are liable to the creditors as a body in the full sum of the excess (in this case \$850,000), without regard to the amount due them collectively or individually, and though the corporation may be willing and able to pay every debt it owes, as it falls due or is demanded. Nor does it matter whether the debts are in excess at the time the suit is brought or not; for, "if, at any time," the indebtedness exceeds the capital stock, the assenting trustees are liable. Nor, by the strict terms of the clause, are the defendants liable to a single

creditor, if there be more than one, but to all—not to each creditor for the amount of his debt, but to all the creditors for the amount of the excess. Yet, in the face of this necessary result, if the literal construction be adopted, plaintiff in error maintains that the excess of indebtedness incurred above the capital is to be treated as a penalty, and that *any* creditor can sue for that penalty without regard to the rights of the others. If the action is to recover a penalty, the defendants can only be liable to one action and to one penalty, and the recovery by plaintiff, if he had the right to recover, could be pleaded in bar of any other action for the same penalty.

But it is not readily to be believed that Congress intended to make the trustees liable beyond the debts of the bank, which it failed or refused to pay; yet, if the excess is a penalty, it would be no defence for the directors to plead that the bank was ready and willing and had never refused to pay when demand was made. In fact, while the bank, *outside of its capital stock*, may have had a million of dollars in its vaults ready to pay, a single creditor, who had never demanded his money of the bank, could sue the trustees. Nor can we believe that an act intended for the benefit of the creditors generally when the bank proves insolvent, can be justly construed in such a manner that any one creditor can appropriate the whole or any part of this liability of the trustees to his own benefit, to the possible exclusion of all or of any part of the other creditors. But such may, and probably would, often be the result, if any one creditor could sue alone, while there were others unsecured.

We are of opinion that the fair and reasonable construction of the act is, that the trustees who assent to an increase of the indebtedness of the corporation beyond its capital stock, are to be held guilty of a violation of their trust; that Congress intended that, so far as this excess of indebtedness over capital stock was necessary, they should make good the debts of the creditors who had been the sufferers by their breach of trust; that this liability constitutes a fund for the benefit of all the creditors who are entitled to share in it in proportion to the amount of their debts, so far as may be necessary to pay these debts. The remedy for this violation of duty as trustees is in its nature appropriate to a court of chancery. The powers and instrumentalities of that court enable it to ascertain the excess of the indebtedness over the capital stock, the amount of this which each trustee may have assented to, and the extent to which the funds of the corporation may be resorted to for the payment of the debts; also the number and names of the creditors, and the amount of their several debts, to determine the sum to be recovered of the trustees, and apportioned among the creditors, in a manner which the trial by jury and the rigid rules of common-law proceedings render impossible.

This course avoids the injustice of many suits against defendants for the same liability, and the greater injustice of permitting one creditor to absorb all, or a very unequal portion, of the sum for which the trustees are liable; and it adjusts the rights of all concerned on the equitable principles which lie at the foundation of the statute.

Counsel for plaintiff cites a number of adjudged cases, mostly from the courts of New York, in which it is held that an action at law may be maintained against an individual stockholder in favor of an individual creditor, under the statute of that state that makes the stockholder liable to the amount of his stock when the corporation is insolvent. But there the liability of the stockholder is several, and is limited to the amount of his stock, a fixed sum easily ascertained. It is held in those courts, however, as stated in the *Bank of Pough-*

keepsie v. Ibbotson, 24 Wendell, 473, that chancery has a concurrent jurisdiction; and in the case of *Van Hook v. Whitlock*, 3 Paige Chy. 409, it was said that the remedy at law is a very imperfect one. Without deciding whether we would follow those decisions in a similar case arising in this district, it is sufficient to say that there is an obvious distinction between the liability of stockholders to the amount of their stock, which is a part of the obligation assumed when the stock is taken, and which is an exact sum, ascertainable by the number of shares owned by the shareholder, and the case of the managing trustees jointly liable for a violation of their trust to all the creditors of the corporation who may be injured thereby.

In the Supreme Judicial Court of Massachusetts, under the identical form of words which we are construing in the present case, it has been repeatedly decided that the only remedy is a suit in equity, in which all the creditors are parties, and that even in equity one creditor cannot sue alone, but must either join the other creditors or bring his suit on behalf of himself and all the others. And while the case is considered in reference to remedies afforded by the statute, it is placed on the solid ground that the fund, by the statute, consists of the excess of all debts over the capital, and that there are various parties having several and unequal claims against the fund, which exceed it in amount. A demurrer to the action at law was sustained on these grounds in the *Merchants' Bank of Newburyport v. Stevenson* and others, 10 Gray, 232. See also, *Crease v. Babcock*, 19 Metcalf, 501, 5 Allen, 398. The same principle is held by this court, in the recent case of *Pollard v. Bailey*, 20 Wall. 520, which we think disposes of the one before us.

The judgment of the Supreme Court of the District of Columbia is accordingly affirmed.

BOOK NOTICES.

HUBBELL'S LEGAL DIRECTORY. For Lawyers and Business Men; Containing Names of Attorneys throughout the United States and Canada; a Synopsis of the Collection Laws of each State; Synopsis of the Bankrupt Law, etc. J. H. HUBBELL, Editor and Compiler. New York: 1876.

This is the seventh annual volume of this very useful work of reference, and is prepared for the year commencing October 1, 1876. Its object is to aid professional and business men throughout the country in the transaction of their business, by furnishing a list of attorneys, a synopsis of the laws of each state and territory, and of Canada, relative to the Collection of Debts, Execution and Acknowledgment of Deeds and Wills, Taking of Depositions, Insolvent Laws, Descent of Property, Interest, Tax Law, Mortgages, Claims against Estates, etc. It likewise contains a concise digest of the bankrupt law, a calendar, and list of judges and officers of the different courts, both state and federal, throughout the country. It is one of those books that are constantly wanted for reference, and had, therefore, better be kept on the desk than on the shelf. We find it useful every day, and recommend it as being indispensable to both the law office and the counting-house. We would suggest, however, that in future its publication might be advantageously delayed until after the November elections, as we notice they have changed to a considerable extent the list of state judges as published in this volume.

DASSLER'S KANSAS STATUTES, VOLUME I.—The General Statutes of Kansas. By C. F. W. DASSLER, of the Leavenworth Bar. St. Louis: W. J. Gilbert. In two volumes. Volume 1; pp. 682.

This work is intended to comprise all the laws of a

general nature passed by the Legislature of Kansas, and is based upon the General Statutes of 1868, embracing all of those statutes still in force, together with subsequent enactments, including the session laws of 1876. It also contains the Constitution of Kansas, thoroughly annotated, so as to show the course of the decisions of the Supreme Court of Kansas, construing its various provisions. This last work has been done by J. D. Shafer, Esq., of the Leavenworth bar. It also contains, in an addenda, the Declaration of Independence and the Constitution of the United States. Like the General Statutes of 1868, on which it is based, its titles are alphabetically arranged, and the first volume contains 3220 sections, divided into seventy-nine chapters, beginning with the title "Admission," and ending with the title "Poor." Every chapter has exactly the same number as in the Statutes of 1868, and each section of the old book, still in force, appears in the same chapter, and with the same section-number, in this work, so that a reference to the former will be equally a reference to this. All subsequent laws, which could not be inserted in the old chapters with propriety, have been placed in new chapters, following the former alphabetical arrangement; thus: Ch. 5 a, 12 a, etc. Each section is numbered three times: it has first a number in parenthesis, which may be termed the index-number, which runs consecutively through the entire work, and by which the work is indexed; secondly, a number corresponding with the numbers in the index, to the chapter or article, as the case may be, which runs consecutively through each chapter; thirdly, the original section-number, either of the general statutes or of the subsequent laws incorporated, and also the section-number of said law. All sections, except those contained in the general statutes, have a reference to the session law, chapter and section from whence taken, placed in brackets at the end of each section. Whenever sections of the old law have been amended, the section as amended has been inserted in lieu of the one repealed. The editor states that he has faithfully followed the laws as published in the general statutes, and in the official edition of the Session Laws; so that all laws embraced in this work are literal copies of the published laws. When a word was found necessary to make sense, he has supplied it in brackets. He has collected, under section one of each chapter, the titles of all the acts inserted in such chapter. The annotations are designed to present the construction placed by the courts of Kansas on the sections to which they are appended. In addition to those decisions which directly involve the construction of some statute, the editor has given references to many decisions of the Supreme Court of Kansas which bear generally upon the subject-matter of the chapter or section. He has, also, in many cases where the laws of Kansas were found, by comparison, to be similar to the statutes of other states, enriched his pages with references to the decisions of such states expounding the particular statute.

It is obvious that a work of this scope, and executed in this manner, involves, on the part of the editor, good judgment and a protracted exertion of the most exacting care. We are satisfied, from experience in compiling a similar work, and from such an examination of this work as one not acquainted with the statute law of Kansas might be expected to make, that Mr. Dassel has bestowed upon his work, at every step, a high degree of care and skill, and that his work, when completed, will present to the profession the entire body of the statute law of Kansas, together with a summary of the judicial exposition it has received. Unless we are mistaken it will be found of the very greatest value to the legal profession of Kansas. It is matter of wonder that a work of this magnitude, the printing of which alone

costs several thousand dollars, intended for the legal profession of a new and sparsely settled state, should have been undertaken by unaided private enterprise. We can not but think that this work will prove of such merit as to deserve substantial recognition and aid at the hands of the state.

BUMP ON FRAUDULENT CONVEYANCES, 2ND EDITION.
A Treatise upon Conveyances made by Debtors to Defraud Creditors; Containing References to all the Cases, both English and American. By ORLANDO F. BUMP, Counselor-at-Law. Second Edition. New York: Baker, Voorhis & Co. 1876.

The author first became generally known to the profession by his annotated editions of the bankrupt law. Soon after the passage of that law several writers engaged in a similar task; but in the end Mr. Bump outstripped all the others in public favor; they declined from their labors, and Mr. Bump has for sometime, we believe, had a clear field in that province of the law. It is fair to presume that this success is due to the fact that his work was better done than that of his rivals. When the author first came out with his treatise on Fraudulent Conveyances, there was, we apprehend, a general suspicion that he might have got out of his vein, and that it would hardly sustain successfully the attacks of hostile criticism. But this suspicion was soon allayed. The arrangement of the book is admirable, the style is succinct and clear to the last degree; the ideas predominate over the words; his reference to authorities is exhaustive; his citations are faithfully in point; his discrimination is keen and practical, and his own views—never interposed except in cases of conflicting decisions—are forcibly presented, and are based on good common sense and strictly logical deduction. These are all good qualities, and they go in this instance to make up a very good book.

Fraudulent conveyances executed for the purpose of hindering, delaying, or defeating creditors, are a very common device; and they give rise to much painful and distressing litigation. The failing debtor doubtless often conceives it to be a paramount duty to save something from the wreck of his estate for the maintenance of his helpless wife and children, or as a shattered plank with which to begin anew, under troubled auspices, the voyage of life. The bankrupt and insolvent laws concede something to this sentiment, something to the unexpected vicissitudes and forlorn conditions of life; but to the fraud itself, on whatever motive it may be based, the law concedes nothing. It has been said that no man ever fails completely in business, without doing something wrong connected with his failure. This is doubtless an extravagant statement, a universal rule established on grounds that would only sustain a general rule. Besides the desire to save something from his estate, the debtor is, no doubt, often goaded on by the hardness of his creditors, or what he deems to be such. And then, all his temptations come at a time when he is troubled in mind, and has the least fortitude to resist them. Under such circumstances, he is too often led into acts which the law will condemn, and which he himself can not afterwards recall without regret.

Our author states, what has been often remarked, that the 13th Eliz. is only declaratory of the common law. He refers also to the Roman law, which contains like provisions. The origin of the civil law doctrine on the subject may be traced in a very satisfactory manner. The precept, *sum cuique tribuito*, embraces the whole duty of the debtor to his creditor. But in the early Roman law, unique reliance was placed on personal coercion. The debtor responded for his debts with his body, and not with his goods. He became the slave of his creditor. On his death his heirs

succeeded to the heritage of misfortune, as *sustinens personam defuncti*; but he might obtain from the Prætor the privilege of withdrawing wholly from the succession. Thereupon the estate was transferred to a stranger, on a kind of composition, in which the creditors abandoned a part of their claims. Afterwards, by an edict of the Prætor Publius Rutilius, a similar composition was allowed in the case of a living debtor. In such case his assets were liquidated for the benefit of his creditors. Still later, the Prætor Julius Paulus, a contemporary of Ulpian and Papinian, conceived the action, which is still known on the continent of Europe as the Pauline action, from the name of its inventor, and which is exactly the equivalent of our suits to set aside conveyances made in fraud of creditors. The edict of Paulus (L. I. Dig. Quale in Fraudem Crediti), is in the civil law, what the 13 Eliz., Ch. 5, is in English law; and it seems to have received precisely the same construction, except in one or two particulars. The principal difference is as to subsequent creditors. It was held to avoid a fraudulent conveyance as against subsequent creditors, where it was made with a fraudulent intent, and with a view to contract new debts, and to defraud the persons with whom such new debts should be contracted. Herein the civil law agreed with our own law. But there was another case in which a subsequent creditor was let in to attack a conveyance, which ordinarily would be valid except as against prior creditors. If A made a fraudulent conveyance with a view to defraud existing creditors, and afterwards B lent him a sum of money, which was applied by A to the payment of a debt contracted prior to the conveyance, in such case B would be subrogated to the rights of the prior creditor, whose debt had been paid with B's money, and could have the fraudulent conveyance annulled. It is not probable that by our law such a remote subrogation would be favored.

The Roman edict was held only to apply to actual alienations, having the effect to diminish the estate of the debtor. However, a fraudulent failure to prosecute a just demand, or to defend an unjust one, was treated as an act of alienation. So, of the abandonment of a servitude. These were considered as passive alienations to the injury of the creditor. They might be voluntary, or on a consideration, and the law raised the same presumptions from the fact of the debtor being in falling circumstances, inadequacy of consideration, retention of possession, and so on, as are now raised by our courts. As, by the Roman law of the time of Paulus, most contracts were purely oral, the remedy was more imperatively demanded, and was oftener invoked than in modern times. Later jurisprudence on the continent has given to this remedy a scope much wider than anything practically known under the English law. Thus, if the debtor fails to accept a pension, or if he renounces a legacy, he is held to commit a fraud on his creditors by voluntarily conceding to others something that would add to his means of paying his creditors. In such cases the creditors may act in his place; they may accept the pension, or lay hold of the legacy. If the debtor should write a book, and should decline to have it copyrighted, doubtless, his creditors might procure the copyright, and apply the proceeds of the sale of the book to the payment of their debts. And so of a patent for an invention. Thus the creditors are subrogated to the rights of property, present and prospective, of the debtor, until their debts are paid.*

Exactly how far our own law goes in this direction, it is by no means easy to determine. Suppose that a falling debtor gratuitously remits debts due to him, and thus

defrauds his creditors, can the creditors interpose, annul this remission, and collect the debts thus remitted? One would think that this might be done; and yet it is believed that there are no adjudicated cases in point. Our author (p. 236) inclines to think that chases in action should be treated generally, in respect of fraudulent conveyances, in the same way as property in possession. But if creditors may collect a debt that the debtor does not wish collected, why may they not cull a legacy that he has declined? There is, possibly, a tolerably satisfactory answer to this question. It is reasonably plain that, by our law, the debtor does not pledge every *faculty* of future acquisition to his creditor. He only pledges such property as he may actually acquire, and he can not be said to have acquired anything until he has had not only a right to it, but an intention to appropriate it to himself. Thus a parent is entitled to the earnings of a minor child; but an insolvent debtor may decline them in favor of the child, by emancipation. See cases cited, p. 249. As to whether the debtor will accept the future earnings of his child, he is a free man, notwithstanding his debts. But as to earnings which he has once accepted, he can not give them to his child without incurring the reprehension of the law.

So as to debts that are due to him. But the offer of a legacy or a pension vest no right of property until accepted. Connected with the propriety of its acceptance there may well be many considerations of grave moment, quite foreign from any considerations relating to creditors. No coercion on such a subject can be exercised without debasing the debtor in his character as a man and a citizen. The doctrine of subrogation may be carried to excess. Suppose that A, by will, leaves all his estate to B, impoverishing thereby his own children. B, being in debt, may have a reasonable hope of getting out of debt, and may not be willing to accept a bequest attended with such obvious hardship to others. Now, if the creditors of B may override his scruples by grasping the legacy that was intended for him, it is clear that, while the children are beggared, the will of the testator has been balked. Nor is it true that, if one declines anything offered to him, he thereby makes a gift of the thing offered to him who offered it. Certainly, if one offers me a hundred dollars, and I decline to receive it, it would be an abuse of speech for me afterwards to say, that I had made him a present of a hundred dollars. But, however the matter may be on principle, it is certain that there is no authority for saying, that by our law a debtor could be made to accept any gratuity for the benefit of his creditors.

It is gratifying to find that there is no great conflict of authority on the topics treated in this volume. Yet on two points there remains an irreconcilable conflict. The first is as to whether retention of possession by the vendor, after a sale of chattels, should raise, in favor of creditors, a conclusive, or a *prima facie* presumption of fraud. At present the weight of the authorities is in favor of the proposition that the retention of possession is not conclusive evidence of fraud. It is, however, a circumstance that will keenly excite the attention of justice, and will cause the real intention of parties to be the object of the most severe investigation. It is true, as has been sometimes remarked in connection with this topic, that acts speak louder than words. But it must be observed that the act of retaining possession by the vendor is ambiguous. A temporary possession by the vendor often subserves the convenience of both parties; sometimes it is unavoidable, and sometimes the motives of one or both parties are not only blameless, but are praiseworthy. It is true that conclusive presumptions save the court a world of trouble; but it is equally true that they often defeat the ends of justice.

* Bedarride, *Traité de Dol et de la Fraude*, Tome IV, Ch. III.

In *Randall v. Cook*, 17 Wend. 53, Bronson, J., remarked, that if the rule that retention of possession is conclusive evidence of fraud, had been declared fifty years previously, it would have saved much time and money, which had been spent in litigation, and would have prevented much fraud on the part of debtors. To this Senator Dickinson, in *Stoddard v. Butler*, 20 Id. 507, replied very happily, by saying: "If, at the same time, the law had laid its interdiction upon all human intercourse as to exchanges or purchases of property, the same result would have been produced, and with about equal justice and propriety."

The author reviews the discussion on this point, from *Twynne's Case*, down to the present time, in a chapter full of interest and instruction.

The second point, as to which there is a serious clash of decisions, is as to whether a deed of assignment for the benefit of creditors, providing that no creditor shall share in the estate until he shall have executed a release discharging the debtor from all demands against him, is void on that ground. The author concludes that such assignments are void on their face; but he shows that a great diversity of opinion prevails on this point. It is to be observed that, as the most, or perhaps all, the states have re-enacted the 13 Eliz., the decisions of the state courts are ostensibly placed on the construction of the statutes, though it is admitted that the law would be the same without the statutes. The Federal courts being bound by the construction placed on the statutes of each state by the highest court of that state, it has happened that the federal decisions on the subject of fraudulent conveyances are only of secondary importance. Thus it may be inferred that Ch. J. Marshall, in *Brashear v. West*, 7 Peters, 615, favored the doctrine that an assignment, exacting releases, is void, although his opinion sustains an assignment of that kind in that case, expressly on the ground that the courts of Pennsylvania, where the assignment was made, had so construed the statute of that state. Thus, too, in *Heydock v. Stanhope*, 1 Curtis, 471, Judge Curtis, for a like reason, based his conclusion on the decision of the case of *Dockray v. Dockray*, 2 R. I. 547, a case which had not then been reported. In *Halsey v. Whitney*, 4 Mason, 206, Judge Story held that an assignment exacting a release was valid, saying that "he yielded to what seemed to be the tone of the authorities." In the case of *The Watchman*, 1 Ware, 235, Judge Ware reviewed the doctrine in a very able opinion, and came to a different conclusion. In *Livermore v. Jenckes*, 21 How. 126, the court decided the question according to the construction placed on the statutes by the courts of Rhode Island and New York. U. M. R.

ABSTRACT OF DECISIONS OF ST. LOUIS COURT OF APPEALS.

October Term, 1876.

HON. THOMAS T. GANTT, Chief Justice.

" EDWARD A. LEWIS, } Associate Justices.
" ROBERT A. BAKEWELL, }

TAXES AND SPECIAL ASSESSMENTS—CONSTITUTIONAL LAW—TAKING PRIVATE PROPERTY FOR PUBLIC USES WITHOUT COMPENSATION.—"A power which compels a man to pay for work and materials which he has neither asked for nor consented to receive, or else to surrender part of his property to another, seems so repugnant to all ideas of that personal protection which is the chief end of civil government, that we must be able to refer it to some distinct basis of constitutional authority. It cannot stand upon the power of taxation; for it lacks, in all cases, the essential characteristics of equality and uniformity." The assumed power can only rest on the right of taking private

property for the public use, upon just compensation being made. A local assessment is not a burden, but an equivalent for the enhancement of the value of property by the improvement. [Citing *Lockwood v. City of St. Louis*, 24 Mo. Rep. 20; *Sheehan v. The Good Samaritan Hospital*, 50 Mo. 135; *City of St. Louis v. Allen*, 53 Mo. 54.] The requirement of a just compensation applies where the value or part of the value of the property is taken, as well as where the property itself, or some interest therein, is taken for public use. [Citing *Creighton v. Manson*, 27 Cal. 627.] Where the amount of a special assessment is greater than the real value of the property assessed, the satisfaction of the lien would be a taking of private property without just compensation, or any compensation at all, and an instruction which authorized such a judgment is erroneous. The benefit derived from the improvement in common with other members of the community would be no compensation. Judgment reversed. Opinion by LEWIS, J.—*Zoeller v. Kellogg*.

EVIDENCE IN TRIAL BEFORE REFEREE.—It is not error for a referee in a suit by an attorney for the value of professional services as attorney at law, to refuse to allow testimony as to the amount received by the attorney of the opposite party in the suit in which the services sued for were rendered. The finding of a referee stands as the verdict of a judge, and is conclusive as to questions of fact, unless there is a total want of evidence to support it. [Citing *Gimbel v. Pignero*, 62 Mo. 240.] Judgment affirmed. Opinion by BAKEWELL, J.—*Brooks v. West*.

FRAUD—RECEIVING DEPOSIT BY INSOLVENT BANK.—Where a check is deposited in a bank which, at the time, is hopelessly and fraudulently insolvent, and contemplating suspension, with the intention on the part of the depositor to pass the title to the check to the bank, the fraudulent concealment by the bank of its insolvent condition vitiates the transaction so that the bank acquired no title to the check upon which it could maintain an action against the maker and endorser. Had the bank acted in good faith, it would have been the owner of the check. But the deposit of the check was made on the faith of the solvency of the bank, and it was a fraud on the part of the bank to receive it. Judgment affirmed. Opinion by BAKEWELL, J.—*Flass, assignee, v. Dietrich et al.*

MANDAMUS—CONSTITUTIONALITY OF SPECIAL LAWS.—In considering a petition for mandamus, directing the clerk of the County Court of St. Louis County to add up and certify the votes cast for the relator at the last general election for constable in St. Louis county, *Held*, that it is the duty of the clerk to add up and count the votes only when the election is legal, and the act of March 24th, 1875, extending the time of office of all constables in St. Louis county to 1878, being a special law for a case for which provision could not be made by a general law, is not in conflict with § 27, Art. 4, Constitution of 1865; consequently the election held for constables in 1876, was illegal and void. The 53d section of Art. IV. of the Constitution of 1875, was intended to govern future legislation, and could have no retroactive force to render that a judicial question, which was before a legislative question. Under the constitution of 1865, it was a question for the general assembly to determine whether a general law could be passed to cover a particular case. If the bonds of these constables are not framed so as to render the obligors responsible until their successors are elected and qualified, they should be renewed, as the sureties did not contemplate the extension of their liability. In any event, they might be entitled to relief on reasonable application. Mandamus refused. Opinion by GANTT, C. J. *State ex rel. Boue v. Gareache*.

PRACTICE—DEMURRER—STIPULATIONS OF PARTIES—JUDGMENT ON DEMURRER—MECHANICS' LIENS.—A petition praying judgment on a money demand and for the enforcement of a mechanic's lien, is not demurrable upon the ground "that the same does not state facts sufficient to entitle them to the special judgment prayed for;" and a demurrer upon such grounds might be stricken out on motion. A demurrer does not reach the prayer for relief. If the petition states facts sufficient to constitute any cause of action, the demurrer "that the petition does not state facts sufficient to constitute a cause of action" must be overruled, and the court will give such relief as plaintiff's case entitles him to. A stipulation for "judgment on demurrer," means only such judgment as the court may be authorized to give upon the case made; and when such a stipulation was made in a suit to enforce a lien, and the case made entitled plaintiff to judgment on a money de-

mand, but not the specific relief prayed for, the court could only render a general judgment for the amount proved. Stipulations of parties cannot authorize the court to do an unlawful thing, or a lawful thing in an unlawful manner. When the lessee has a right to remove improvements at the end of his term, a mechanics' lien will not attach to the land. [Citing *Koenig v. Mueller*, 39 Mo. Rep. 165.] Judgment affirmed. Opinion by LEWIS, J.—*Whitman et al. v. Yaeger et al.*

NOTES.

THERE is an editor somewhere in Ohio, it is said, who publishes marriages under the head of "Attachment Notices."

JOHN A. HOLMAN, Esq., Indianapolis, has just taken the bench of the Superior Court of that city. A well deserved preferment.

THE name of the firm of Diossy & Company, law publishers, New York, has been changed to that of Ward & Peloubet, the real names of the partners.

IN *City of Winona v. Burke*, 1 Syllabi, 87, the Supreme Court of Minnesota held that, in a prosecution under an ordinance of a city, the ordinance should be pleaded and proved, as courts do not take judicial notice of city ordinances.

UNSOLICITED COMPLIMENTS OF THE SEASON.—"It is beautiful in appearance, and full of interest. I congratulate you, and feebly hope you will find your reward. JOHN F. DILLON."—"It is a vast improvement." A. P. CALLAHAN, law publisher, Chicago.—"I am greatly pleased with its appearance. I think it a decided improvement. If you keep it up to the high standard of this one, the profession will be more indebted to you in the future than they have been in the past." DAVID WAGNER.

HON. DAVID WAGNER, for many years a judge of the Supreme Court of Missouri, and long the ablest exponent of law on that bench, has formed a partnership for the practice of the law with Messrs. Dyer and Emmons. Taken together, the combination makes a strong team. Col. Dyer won great reputation as United States District Attorney in the prosecution of the whiskey-ring conspirators. In fact, he did his work so well that the administration had no further use for him, and he was therefore promoted to the more lucrative position of a general practitioner. Col. Emmons is likewise an able and successful lawyer.

IN *Jones v. Russell*, 44 Georgia, 460, it was held that where goods had been consigned to a public auctioneer, who had given bond or security as such, and who had not accounted for the same, this was a *fiduciary* debt, which was not discharged by bankruptcy. In the case of *Meadow v. Sharp*, decided by the same court, and just published (9 Chicago Legal News, 125), the same principle has been reiterated, although the court states that the authorities upon the question are conflicting.

IN a case before an English Vice-Chancellor, lately, a letter was read containing the following diatribe: "If you have already offered up your petition at the shrine of the Great Goddess Chancery, I must listen to her oracular response. Thus a great law-suit will be won; query, by whom? Your goddess has gulped many splendid estates down her horrible gullet, and crunched her hapless victims like a dainty dessert. Oh, grand national preserve for wild beasts! Oh, beasts of prey, how you snap your jaws as you see another carcass dragged to your kennel!"

WE have often heard lawyers dispute among themselves how much it would cost to equip a law library with a complete set of reports of all the states. We had not supposed that any bookseller could offer an entire set of American state reports without breaks, here and there, where volumes were out of print, and had become scarce. But E. D. Myers, law book-seller of Chicago, offers such a set of reports, as we see by an advertisement in the *Chicago Legal News*. He states that they are worth \$12,500, and solicits an offer for them. An American lawyer who could display those books on his shelves might certainly consider himself very well equipped.

STATUTE LAW REVISION.—Mr. Samuel Pepys has the following entry in his diary, under date of April 25th, 1686: "I to the office, where Mr. Prim came to meet about the chest business, and till company came did discourse with me a good while alone in the garden about the laws of

England, telling me the many faults in them, and, among others, their obscurity through multitude of long statutes, which he is about to abstract out of all of a sort; and as he lives and parliaments come, get them put into laws, and the other statutes repealed, and then it will be a short work to know the law, which appears a very noble, good thing." Honest Mr. Pepys could hardly have anticipated to what a patriarchal age his friend must have lived, and how many parliaments would have come and gone, without its becoming a short work to know the law.—[*Law Times* (Eng.)]

HON. HENRY G. SMITH, for many years the leader of the bar of West Tennessee, a man who has grown wealthy in the practice of the law, who has been honored with a seat upon the Supreme Bench of his state, and who, while holding that seat, did honor to the position, has submitted to the sacrifice of serving a term in the senate of Tennessee. Those who know Judge Smith, and who understand the extent and value of his legal practice, will, we are sure, agree with us in saying that such a sacrifice deserves honorable mention. It is very seldom that lawyers, situated as he is, can be induced to serve in their state legislatures. If more of them would make the sacrifice, it would be a great gain to legislation.

THERE is a class of law books, unpretentious in character, founded on local statutes and applicable to particular states, which play a very important part in the administration of justice. Among these are treatises designed for the information of that numerous and respectable magistracy denominated justices of the peace. A great deal of merit is made by members of the bar over the blunders of these unlearned judicial officers; but, nevertheless, they administer, in small controversies, a rude justice which generally is justice, and which conduces to the repose of society. In those states where the unremunerated efforts of some member of the bar have produced a good treatise for the information of these officers, their duty has been made comparatively easy, and the number of mistakes committed by them in the discharge thereof has been greatly diminished. Among the best of these works is a recent publication of Messrs. Duffie & Hill, issued by Wilson & Webb, of Little Rock, called "The Arkansas Justice." This work received warm commendations from Hon. Henry C. Caldwell, United States District Judge for the Eastern District of Arkansas, from Hon. A. H. Garland, formerly governor of the state, from Hon. Sam. W. Williams, with whom our readers are acquainted through his frequent contributions to these columns, from Hon. E. H. English, Chief Justice of the Supreme Court of Arkansas, from George H. Gallagher, a leading member of the Arkansas bar, and from many others. We are glad to notice the advent of so excellent an addition to a class of law books whose publication should be encouraged, even by legislative aid, if necessary, in the new and sparsely populated states.

A NEW AUTHORITY—COBB ON ADMISSIONS AND WITHDRAWALS.—Judge Cobb, of Kansas City, is not only a good lawyer, but upon occasion can tell a good story to illustrate a point. At one time, when he was attending court in one of the Kansas districts, during recess, he related a chapter of his experience for the benefit of both bench and bar. He happened to be attending a trial somewhere in the interior of New York during the examination of a troublesome witness. The adverse counsel frequently objected to questions, for "incompetency" and "irrelevancy," until the presiding judge, getting impatient at the interruptions, sought to put a stop to the wrangle by declaring that the testimony would all be admitted subject to objections, and if incompetent would be withdrawn by instructions. At this the objecting attorney sprang to his feet in great wrath and exclaimed: "Does your honor mean to say that this incompetent testimony shall go to the jury, and after it has done the damage may be withdrawn? Why, sir, suppose I should take that poker and heat it red-hot, would your honor be willing to allow me to thrust it into your body, provided I would agree to withdraw it as soon as your honor said it burnt?" The story was well received, and next day, when a distinguished lawyer from Leavenworth was trying to work in some rather doubtful testimony upon the ground that it might be "withdrawn by instructions," his adversary objected, and waiving all argument asked leave to refer the court to a single authority: "Cobb on Admissions and Withdrawals." An appreciative smile illuminated the countenance of his honor as he declared: "The authority cited is conclusive. The objection to the testimony is sustained!"